The New Matrimonial Legislation

a Commentary on the Decree of the Sacred Congregation of the Council, *Ne Temere*, published on the 2nd of August 1907, by order of Pope Pius X, on

Betrothal and Marriage

BY

CHARLES J. CRONIN D. D.

Private Chamberlain of H. H. Pius X - Vice-Rector of the English College, Rome

Publishing Office of *Rome*, Palazzo Taverna, Rome.

R. & T. WASHBOURNE, Ltd.

1, 2 & 4 Paternoster Row, London, and 248 Buchanan Street, Glasgow.

BENZIGER BROS

New York, Cincinnati and Chicago.

—

1908

NIHIL OBSTAT

Laurentius Janssens, O. S. B., Censor ex officio.

Romæ, ex ædibus S. Anselmi, die 22 Martii, 1908.

IMPRIMATUR

Fr. Albertus Lepidi, O. P., S. P. A. Magister.

IMPRIMATUR

Josephus Ceppetelli, Patr. Constantinop., Vicesgerens.

CONTENTS

PAGE

The Decree (Latin Text) 1

The Decree (English Translation) 9

The History of the Decree 19

Commentary 26

The Preamble 26

The Decree 32

PART I.

On Betrothals (art. I) 32

PART II.

On Marriage.

Chap. I. — The Substance of the Law (art. II, III). 41

§ 1. — The Parochus 45

§ 2. — The Ordinary 58

§ 3. — The Delegate 69

§ 4. — The Witnesses 81

PAGE

CHAP. II. — Conditions for the Validity of Marriage (art. IV) 87
§ 1. 88
§ 2. 97
The True Mind of the Council of Trent 101
The Post-Tridentine Discipline. . . 151
§ 3. 180

CHAP. III. — Conditions for the Licit Celebration (art. V) 189
§ 1. 189
§ 2. 190
§ 3. 192
§ 4. 197
§ 5. 201

CHAP. IV. — Delegation (art. VI) 204

CHAP. V. — Exceptions from the General Law . 222
§ 1. — Danger of Death (art. VII). . 222
§ 2. — Inability of Parochus to be present (art. VIII) 226

CHAP. VI. — Registration (art. IX) 239
§ 1. 239
§ 2. 245
§ 3. 251

CHAP. VII. — Penalties (art. X) 255

PAGE

CHAP. VIII. — The Subjects of the Law (art. XI) . 263

§ 1. — Catholic Marriages 283

§ 2. — Mixed Marriages 297

§ 3. — Non-Catholic Marriages . . . 300

CHAP. IX. — The Final Clauses 302

APPENDIX 311

I. — Are private Sponsalia binding in Conscience? 311

II. — Decree of the S. C. of the Council, February 1st., 1908 323

INDEX 327

The New Matrimonial Legislation

DECRETUM

DE SPONSALIBUS ET MATRIMONIO
JUSSU ET AUCTORITATE SS. D. N. PII PAPAE X
A S. CONGREGATIONE CONCILII EDITUM.

Ne temere inirentur clandestina coniugia, quae Dei Ecclesia iustissimis de causis semper detestata est atque prohibuit, provide cavit Tridentinum Concilium, *cap. I, Sess. XXIV de reform. matrim.* edicens: "Qui aliter quam praesente parocho vel alio sacerdote de ipsius parochi seu Ordinarii licentia et duobus vel tribus testibus matrimonium contrahere attentabunt, eos Sancta Synodus ad sic contrahendum omnino inhabiles reddit, et huiusmodi contractus irritos et nullos esse decernit."

Sed cum idem Sacrum Concilium praecepisset, ut tale decretum publicaretur in singulis paroeciis, nec vim haberet nisi iis in locis ubi esset promulgatum; accidit ut plura loca, in quibus publicatio

illa facta non fuit, beneficio tridentinae legis caruerint, hodieque careant, et haesitationibus atque incommodis veteris disciplinae adhuc obnoxia maneant.

Verum nec ubi viguit nova lex, sublata est omnis difficultas. Saepe namque gravis exstitit dubitatio in decernenda persona parochi, quo praesente matrimonium sit contrahendum. Statuit quidem canonica disciplina, proprium parochum eum intelligi debere, cuius in paroecia domicilium sit, aut quasi domicilium alterutrius contrahentis. Verum quia nonnunquam difficile est iudicare, certo ne constet de quasi-domicilio, haud pauca matrimonia fuerunt obiecta periculo ne nulla essent: multa quoque, sive inscitia hominum sive fraude, illegitima prorsus atque irrita deprehensa sunt.

Haec dudum deplorata, eo crebrius accidere nostra aetate videmus, quo facilius ac celerius commeatus cum gentibus, etiam disjunctissimis, perficiuntur. Quamobrem sapientibus viris ac doctissimis visum est expedire ut mutatio aliqua induceretur in iure circa formam celebrandi connubii. Complures etiam sacrorum Antistites omni ex parte terrarum, praesertim e celebrioribus civitatibus, ubi gravior appareret necessitas, supplices ad id preces Apostolicae Sedi admoverunt.

Flagitatum simul est ab Episcopis, tum Europae plerisque, tum aliarum regionum, ut incommodis

occurreretur, quae ex sponsalibus, idest mutuis promissionibus futuri matrimonii, privatim initis, derivantur. Docuit enim experientia satis, quae secum pericula ferant eiusmodi sponsalia: primum quidem incitamenta peccandi causamque cur inexpertae puellae decipiantur; postea dissidia ac lites inextricabiles.

His rerum adiunctis permotus SS.mus D. N. Pius PP. X pro ea quam gerit omnium Ecclesiarum sollicitudine, cupiens ad memorata damna et pericula removenda temperatione aliqua uti, commisit S. Congregationi Concilii ut de hac re videret, et quae opportuna aestimaret, Sibi proponeret.

Voluit etiam votum audire Consilii ad ius canonicum in unum redigendum constituti, nec non Em̄orum Cardinalium qui pro eodem codice parando speciali commissione delecti sunt: a quibus, quemadmodum et a S. Congregatione Concilii, conventus in eum finem saepius habiti sunt. Omnium autem sententiis obtentis SS.mus Dominus S. Congregationi Concilii mandavit, ut decretum ederet quo leges a Se, ex certa scientia et matura deliberatione probatae, continerentur, quibus sponsalium et matrimonii disciplina in posterum regeretur, eorumque celebratio expedita, certa atque ordinata fieret.

In executionem itaque Apostolici mandati S. Concilii Congregatio praesentibus litteris constituit atque decernit ea quae sequuntur.

DE SPONSALIBUS.

I. — Ea tantum sponsalia habentur valida et canonicos sortiuntur effectus, quae contracta fuerint per scripturam subsignatam a partibus et vel a parocho, aut a loci Ordinario, vel saltem a duobus testibus.

Quod si utraque vel alterutra pars scribere nesciat, id in ipsa scriptura adnotetur; et alius testis addatur, qui cum parocho, aut loci Ordinario, vel duobus testibus, de quibus supra, scripturam subsignet.

II. — Nomine parochi hic et in sequentibus articulis venit non solum qui legitime praeest paroeciae canonice erectae; sed in regionibus, ubi paroeciae canonice erectae non sunt, etiam sacerdos cui in aliquo definito territorio cura animarum legitime commissa est, et parocho aequiparatur; et in missionibus, ubi territoria necdum perfecte divisa sunt, omnis sacerdos a missionis Moderatore ad animarum curam in aliqua statione universaliter deputatus.

DE MATRIMONIO.

III. — Ea tantum matrimonia valida sunt, quae contrahuntur coram parocho vel loci Ordinario vel sacerdote ab alterutro delegato, et duobus

saltem testibus, iuxta tamen regulas in sequentibus articulis expressas, et salvis exceptionibus quae infra n. VII et VIII ponuntur.

IV. — Parochus et loci Ordinarius valide matrimonio adsistunt,

§ 1. a die tantummodo adeptae possessionis beneficii vel initi officii, nisi publico decreto nominatim fuerint excommunicati vel ab officio suspensi;

§ 2. intra limites dumtaxat sui territorii: in quo matrimoniis nedum suorum subditorum, sed etiam non subditorum valide adsistunt;

§ 3. dummodo invitati ac rogati, et neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum.

V. — Licite autem adsistunt,

§ 1. constito sibi legitime de libero statu contrahentium, servatis de iure servandis;

§ 2. constito insuper de domicilio, vel saltem de menstrua commoratione alterutrius contrahentis in loco matrimonii;

§ 3. quod si deficiat, ut parochus et loci Ordinarius licite matrimonio adsint, indigent licentia parochi vel Ordinarii proprii alterutrius contrahentis, nisi gravis intercedat necessitas, quae ab ea excuset.

§ 4. Quoad *vagos*, extra casum necessitatis parocho ne liceat eorum matrimoniis adsistere, nisi re ad Ordinarium vel ad sacerdotem ab eo delegatum delata, licentiam adsistendi impetraverit.

§ 5. In quolibet autem casu pro regula habeatur, ut matrimonium coram sponsae parocho celebretur, nisi aliqua iusta causa excuset.

VI. — Parochus et loci Ordinarius licentiam concedere possunt alii (1) sacerdoti determinato ac certo, ut matrimoniis intra limites sui territorii adsistat.

Delegatus autem, ut valide et licite adsistat, servare tenetur limites mandati, et regulas pro parocho et loci Ordinario n. IV et V superius statutas.

VII. — Imminente mortis periculo, ubi parochus, vel loci Ordinarius, vel sacerdos ab alterutro delegatus, haberi nequeat, ad consulendum conscientiae et (si casus ferat) legitimationi prolis, matrimonium contrahi valide ac licite potest coram quolibet sacerdote et duobus testibus.

VIII. — Si contingat ut in aliqua regione parochus locive Ordinarius, aut sacerdos ab eis delegatus, coram quo matrimonium celebrari queat, haberi non possit, eaque rerum conditio a mense iam perseveret, matrimonium valide ac licite iniri potest emisso a sponsis formali consensu coram duobus testibus.

IX. — § 1. Celebrato matrimonio, parochus, vel qui eius vices gerit, statim describat in libro

---

(1) All the printed texts that I have seen, with the exception of that of the official *Acta Sanctæ Sedis*, have *alio*. *Alii*, of course, is the correct form of the word.

matrimoniorum nomina coniugum ac testium, locum et diem celebrati matrimonii, atque alia, iuxta modum in libris ritualibus vel a proprio Ordinario praescriptum; idque licet alius sacerdos vel a se vel ab Ordinario delegatus matrimonio adstiterit.

§ 2. Praeterea parochus in libro quoque baptizatorum adnotet, coniugem tali die in sua parochia matrimonium contraxisse. Quod si coniux alibi baptizatus fuerit, matrimonii parochus notitiam initi contractus ad parochum baptismi sive per se, sive per curiam episcopalem transmittat, ut matrimonium in baptismi libri referatur.

§ 3. Quoties matrimonium ad normam n. VII aut VIII contrahitur, sacerdos in priori casu, testes in altero, tenentur in solidum cum contrahentibus curare, ut initum coniugium in praescriptis libris quam primum adnotetur.

X. — Parochi qui heic hactenus praescripta violaverint, ab Ordinariis pro modo et gravitate culpae puniantur. Et insuper si alicuius matrimonio adstiterint contra praescriptum § 2^{i} et 3^{i} n. V, emolumenta *stolae* sua ne faciant, sed proprio contrahentium parocho remittant.

XI. — § 1. Statutis superius legibus tenentur omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi (licet sive hi, sive illi ab eadem postea defecerint), quoties inter se sponsalia vel matrimonium ineant.

§ 2. Vigent quoque pro iisdem de quibus supra catholicis, si cum acatholicis sive baptizatis, sive non baptizatis, etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus, sponsalia vel matrimonium contrahunt; nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum.

§ 3. Acatholici sive baptizati sive non baptizati, si inter se contrahunt, nullibi ligantur ad catholicam sponsalium vel matrimonii formam servandam.

Praesens decretum legitime publicatum et promulgatum habeatur per eius transmissionem ad locorum Ordinarios: et quae in eo disposita sunt ubique vim legis habere incipiant a die solemni Paschae Resurrectionis D. N. I. C. proximi anni 1908.

Interim vero omnes locorum Ordinarii curent hoc decretum quamprimum in vulgus edi, et in singulis suarum dioecesum parochialibus ecclesiis explicari, ut ab omnibus rite cognoscatur.

Praesentibus valituris de mandato speciali SS.mi D. N. Pii PP. X, contrariis quibuslibet etiam peculiari mentione dignis minime obstantibus.

Datum Romae die 2ª mensis Augusti anni 1907.

✠ Vincentius Card. Ep. Praenest., *Praefectus.*

C. De Lai, *Secretarius.*

DECREE

ON BETROTHAL AND MATRIMONY
PUBLISHED
BY THE SACRED CONGREGATION OF THE COUNCIL
BY ORDER AND WITH THE AUTHORITY
OF OUR MOST HOLY LORD POPE PIUS X.

The Council of Trent, *cap. I, Sess. XXIV de reform. matrim.*, made prudent provision against the rash celebration of clandestine marriages, which the Church of God for most just reasons has always detested and forbidden, by decreeing: "Those who otherwise than in the presence of the parish-priest or of another priest acting with the permission of the parish-priest or of the Ordinary, and in the presence of two or three witnesses, shall attempt to contract matrimony, the Holy Synod renders utterly incapable of thus contracting marriage, and decrees that such contracts are null and void."

But since the same Sacred Council ordained that the said decree should be published in every parish, and was not to have force except in those places in which it had been promulgated, it has come to pass that many places, in which the publication has not been made,

have been deprived of the benefit of the Tridentine law, and are still without it, and continue to be subject to the perplexities and disadvantages of the old discipline.

Nor has all difficulty been removed in those places where the new law has been in operation. For often there has been grave doubt in deciding as to the person of the parish-priest before whom a marriage is to be celebrated. The canonical discipline did indeed determine that he in whose parish one or other of the contracting parties has his or her domicile or quasi-domicile, is to be considered their proper parish-priest as regards matrimony. But as it is sometimes difficult to judge whether a quasi-domicile has really been acquired, not a few marriages have been exposed to the danger of nullity: many too, owing either to ignorance or fraud, have been found to be quite illegitimate and void.

It is observed that these deplorable results have become more and more frequent in our own time on account of the ever increasing facility and celerity of intercommunication between even the most distant countries. It has therefore seemed expedient to wise and learned men that some change should be introduced into the law regulating the form of the celebration of marriage; and a great many bishops in all

parts of the world, but especially in the more populous cities, where the necessity seemed to be more urgent, have petitioned the Holy See to this end.

At the same time, Bishops, not only, though principally, of Europe, but also of other parts, have urged that a remedy be applied to the difficulties that arise from betrothals, that is, mutual promises of future marriage, made privately. For experience has sufficiently shown the dangers of such betrothals. They are, first of all, an incentive to sin, and lead to the deception of inexperienced girls, and afterwards give rise to inextricable dissensions and disputes.

Moved by this condition of things, Our Most Holy Lord Pope Pius X, desiring, in His solicitude for all the churches, to introduce some modifications with the object of removing these evils and dangers, committed to the S. Congregation of the Council the task of examining into the matter, and of proposing to Himself the measures it should deem opportune.

It was His pleasure also to consult the Council appointed for the codification of the Canon Law, as well as the Most Eminent Cardinals selected to serve on the special commission for the preparation of the new code: by whom, as well as by the S. Congregation of the Council, frequent meetings have been held for that purpose. When

the opinions of all had been taken, His Holiness ordered the S. Congregation of the Council to issue a decree containing the laws approved by Himself on sure knowledge and after mature deliberation, by which the discipline regarding betrothal and marriage would be regulated for the future, and their celebration carried out with expedition, precision and order.

In execution, therefore, of the Apostolic mandate the S. Congregation of the Council by these presents enacts and decrees as follows:

ON BETROTHAL.

I. — Only those betrothals are considered valid and have their canonical effects, that have been contracted by means of a written document signed by both parties and by either the parish-priest, or the local Ordinary, or at least by two witnesses.

In case one or both of the parties be unable to write, this fact is to be noted in the document, and an additional witness must sign it, together with the parish-priest, or the local Ordinary, or two witnesses as mentioned above.

II. — Here and in the following articles by the term *parish-priest* is to be understood not only the lawful pastor ot a canonically erected

parish; but also, in those parts where parishes are not canonically erected, the priest to whom the cure of souls has been legitimately entrusted in any specified district, and who is equivalent to a parish-priest; and in missions, where as yet there are no clearly defined territorial divisions, all priests who are appointed by the Superior of the mission to the universal cure of souls in any station.

ON MARRIAGE.

III. — Only those marriages are valid that are contracted before the parish-priest, or the local Ordinary, or a priest delegated by either of these, and at least two witnesses, according to the rules laid down in the following articles, and subject to the exceptions mentioned below, n. VII and VIII.

IV. — The parish-priest and the local Ordinary validly assist at marriage,

§ 1. only from the day they have taken possession of their benefice or entered upon their office, unless they have been by name in a public decree excommunicated or suspended from their office;

§ 2. only within the limits of their territory: within which they validly assist at the marriages

not only of their subjects, but also of those not subject to them;

§ 3. provided that, having been invited and requested, and not constrained either by violence or by grave fear, they ask and receive the consent of the contracting parties.

V. — They assist licitly,

§ 1. when they have legitimately assured themselves of the freedom of the contracting parties, having duly complied with the requirements of the law;

§ 2. when they have also ascertained that one of the contracting parties has a domicile or at least has dwelt for a month in the place where the marriage is celebrated;

§ 3. if this condition be lacking, the parish-priest and the local Ordinary, to assist licitly at the marriage, require the permission of the parish-priest or the Ordinary of one of the contracting parties, unless it be a case of grave necessity, which excuses from this permission.

§ 4. As regards persons with no fixed abode (*vagos*), except in case of necessity it is not lawful for a parish-priest to assist at their marriages, until he has reported the matter to the Ordinary or to a priest delegated by him, and has obtained permission to assist.

§ 5. It is to be considered the rule in all cases that the marriage should be celebrated

before the parish-priest of the bride, unless some just cause excuses from it.

VI. — The parish-priest and the local Ordinary may grant to another priest distinctly specified and designated, permission to assist at marriages within the limits of their territory.

The delegate, in order to assist validly and licitly, is bound to observe the limits of his mandate and the rules laid down above in n. IV and V for the parish-priest and the local Ordinary.

VII. — In imminent danger of death, when the parish-priest, or the local Ordinary, or a priest delegated by either, cannot be had, in order to provide for the relief of conscience and (should the case require it) for the legitimation of offspring, marriage may be contracted validly and licitly before any priest and two witnesses.

VIII. — If in any locality the parish-priest or the local Ordinary, or a priest delegated by them, before whom marriage could be celebrated, is not to be had, and that this condition of things has already lasted for a month, marriage may be validly and licitly contracted, by the bridegroom and bride making the formal declaration of consent in the presence of two witnesses.

IX. — § 1. After the celebration of a marriage the parish-priest or he who takes his place, must at once enter in the marriage register the

names of the married pair and of the witnesses, the place and date of the celebration of the marriage and the other particulars, in the manner prescribed in the ritual books or by his Ordinary; and this even though another priest delegated by himself or by the Ordinary has assisted at the marriage.

§ 2. Moreover the parish-priest must note in the baptismal register also, the fact that the person has been married on such a day in his parish. If the person who has been married was baptised elsewhere, the parish-priest who assisted at the marriage must forward a notification of the marriage, either direct or through the episcopal curia, to the parish-priest of the place where the person was baptised, in order that the marriage may be entered in the baptismal register.

§ 3. Whenever a marriage is contracted in the manner described in n. VII or VIII, the priest in the former case, the witnesses in the latter, are bound conjointly with the contracting parties, to see that the marriage is entered as soon as possible in the prescribed registers.

X. — Parish-priests who violate the rules thus far laid down, are to be punished by their Ordinaries according to the nature and gravity of their offence. Furthermore, if they assist at the marriage of anyone in violation of the rules laid

down in §§ 2 and 3 of n. 5, they may not appropriate the stole-fees, but must remit them to the parish-priest of the contracting parties.

XI. — § 1. The above laws are binding on all persons baptised in the Catholic Church and on all converts from heresy or schism (even though either the latter or the former have fallen away afterwards from the Church), whenever they become engaged or marry among themselves.

§ 2. They bind also the same Catholics as above, if they become engaged to or marry non-Catholics, whether baptised or unbaptised, even after a dispensation has been obtained from the impediment *mixtae religionis* or *disparitatis cultus;* unless the Holy See has ordained otherwise for some particular place or country.

§ 3. Non-Catholics, whether baptised or unbaptised, who contract among themselves, are nowhere bound to observe the Catholic form of betrothal or marriage.

The present decree is to be held as legally published and promulgated by its transmission to the local Ordinaries: and its provisions shall begin to have the force of law everywhere from the day of the Solemnity of the Resurrection of Our Lord Christ in the coming year 1908.

Meanwhile let all local Ordinaries see that this decree is made public as soon as possible,

and explained in all the parish-churches of their dioceses, so that all may obtain an accurate knowledge of it.

These presents are to have force by the special command of Our Most Holy Lord Pope Pius X, everything to the contrary, even deserving of special mention, notwithstanding.

Given at Rome on the second day of August in the year 1907.

✠ VINCENT Card. Bishop of Palestrina, *Prefect.*

C. DE LAI, *Secretary.*

The History of the Decree

On the 20th of May, 1905, the Sacred Congregation of the Council met to consider the petitions which the Cardinal Archbisop of Paris and the Cardinal Bishop of Breslau had made to the Holy See to relax in some measure the stringency of the law relating to domicile and quasi-domicile as far as these affect the validity of the Sacrament of Matrimony. Some remissions had already been granted, but they were only local privileges, which were granted on account of special local circumstances, and which therefore could not be claimed beyond the places for which the concessions had been made. Thus the Archbishop of Paris had in 1898 (9th of November) obtained the privilege that the *fact* of residence for six months in a parish of the city of Paris, was sufficient for the acquisition of a quasi-domicile enabling a person to marry validly in that parish, and that there was no necessity to enquire into the intention of residing there for the greater part of a year.

On the 23rd of June, 1902, Cardinal Kopp, Prince-Bishop of Breslau, in whose diocese the city of Berlin is situated, addressed to the Sacred Congregation of the Council an application that the privilege granted to Paris might be extended to Berlin, where similar conditions prevailed. In his

petition His Eminence said that "From all parts of Germany men flock to Berlin with the object of establishing there their domicile or quasi-domicile, if all goes well with them; but if not, they leave after a short time, so that the city of Berlin is in a constant state of extraordinary fluctuation. From this continual movement of the population a great difficulty arises in the matter of domicile or quasi-domicile necessary for matrimony. For it often happens that people marry in Berlin, who are living in some parish of the city, but have no intention of acquiring either domicile or quasi-domicile. Hence, since the inquiry as to their intention of remaining is easily omitted, and the parties who wish to be married do not allude to it spontaneously, it is to be feared that sometimes invalid marriages are contracted, as the parish-priest who assists is (in the legal sense) incompetent.

"Wherefore I most humbly petition Your Holiness to deign to grant to the city of Berlin the privilege already granted to Paris on the 9th of November, 1898, viz., that a quasi-domicile for marriage may be acquired at Berlin, without enquiry into intention, provided that those who came to Berlin from another place or parish, reside in a parish of that city for six months" (1).

As this request involved a principle of the utmost importance, the Sacred Congregation put the

---

(1) This is not the place to give a detailed account of the discipline of the Church with regard to matrimony, and of the conditions requisite for the validity of marriage. That will be done in the course of the commentary on the clauses of the decree.

matter into the hands of one of its most learned Consultors, the Very Rev Father Pius de Langogne, O. M. Capp., ordering him to report, not so much on the particular case, as on the general principle which ought to govern all similar cases, in view of the actual condition of society at the present day. This commission was one requiring profound and patient study, and could not be executed in a moment. In the result, the Consultor presented to the Sacred Congregation a long and most learned document in which the three following questions were discussed: "I. Qualis hodie sit jurisprudentia canonica circa quasi-domicilium et simplicem commorationem respectu matrimoniorum juxta formam Tridentinam ineundorum? II. An, et quibus de causis, expediat dictam jurisprudentiam tantisper immutare seu, rectius, moderare? III. Quonam opportuniori sive securiori modo statui posset dicta moderatio?" (Acta S. Sedis, vol. 38, p. 244-45).

In the meantime, the Sacred Congregation of the Council asked the Assessor of the Holy Office (the Congregation which had granted the above-mentioned privilege to Paris in 1898), whether that Congregation had ever admitted the *principle* that six months' residence in a parish was sufficient for the validity of marriage there, without any investigation being required into the intention of remaining there. The Assessor on the 26th of January, 1903, replied that the principle had never been admitted, and that the dispositions made for Paris must be considered as quite special.

Soon afterwards (9th of November, 1903) a further petition arrived from the Cardinal Archbishop of Paris, in which he said that "He had many

times reported to the Holy See the very grave anxieties that weigh upon the Archiepiscopal Curia in regard to marriages that are contracted in the city and throughout the diocese of Paris, and which turn out to be of doubtful validity or utterly invalid, on account of the uncertainty about domicile or quasi-domicile, with the result that decisions of nullity are not infrequently pronounced, not without great scandal. To remedy, at least in part, such great evils, he earnestly prays Your Holiness to deign to extend to the city and diocese of Paris, in the same terms and to the same effect, the declaration that was made for the United States of North America, on the 6th of May, 1886, that a month's residence suffices for the validity of matrimony, namely: "Se conferentes e loco ubi viget caput *Tametsi* in alium locum, dummodo ibi continuo commorati fuerint per spatium saltem unius integri mensis, censendos esse ibidem habere quasi domicilium in ordine ad matrimonium, quin inquisitio facienda sit de animo ibi permanendi per majorem anni partem." (Acta S. Sedis, vol. 38, p. 210).

Having received the *votum* of the Consultor, the Sacred Congregation of the Council met on the 20th of May, 1905, to discuss these petitions and the general principle underlying the whole question; and issued the following decision: Pro gratia juxta petita ab E.mo Archiepiscopo Parisiensi, facto verbo cum SS.mo, et ad mentem. The *mens* (that is, a special consideration, instruction, condition, etc., superadded to the direct answer to the question asked), which was not at first made public, was as follows: "I. That the decision given for Paris be communicated to Cardinal Kopp, so that he may,

if he wishes, apply for a similar extension for his diocese (1); II. That the opinion of two canonists be asked, in preparation for a decree modifying the matrimonial legislation relating to the chapter *Tametsi*, keeping in view the following fundamental points: *a*) that the parish-priest must assist at matrimony by request and voluntarily, so that all surprise marriages may be abolished; *b*) that no parish-priest should assist at the marriage of persons who are not his parishioners, nor even of his parishioners who have resided away from the parish long enough to contract an impediment, unless the freedom (*status liber*) of the contracting parties is proved *ad tramitem juris; c*) given these two conditions, that anyone may marry *coram Ordinario loci aut parocho* (*quicumque sit*) *et duobus vel tribus testibus*. And that a canonical period be fixed when these new dispositions shall come into force for the whole Church."

It was decided, therefore, at this session, that the actual discipline with regard to domicile and quasi-domicile necessary for the validity of matrimony, must be modified; but what was to be substituted was not determined. The two Consultors appointed to report were Monsignor Augustus Sili, now Grand Almoner of the Pope, and Archbishop of Cæsarea of Pontus, and the Very Rev. Charles Lombardi, Professor of Canon Law in the Pontifical University of the Roman Seminary, and Defensor

---

(1) The reason why the Sacred Congregation did not reply directly to Cardinal Kopp's petition was that the Holy See was disposed to grant him much more than he asked for.

Vinculi Matrimonialis. Their proposals were presented at the beginning of 1906, and considered by the Sacred Congregation in the session of the 17th of February, 1906, together with a *schema* of the decree, proposed by Mgr De Lai, Secretary of the Congregation. At this meeting Their Eminences agreed upon the substance of the fundamental principle, though the formula in which it was to be expressed was not definitely decided. It was, for the time being, couched in the following terms: "Catholici omnes, ubique terrarum, etiam in locis ubi hucusque publicatum non fuit caput *Tametsi* Concilii Tridentini, incipiendo a die..., non poterunt matrimonium valide contrahere, nisi mutuum consensum præstent coram aliquo loci Ordinario aut parocho catholico, quicumque sit, qui ad adsistendum rogatus fuerit, et coram duobus saltem testibus. Et matrimonia ex inopinato aut aliter contracta nulla et irrita erunt." (Acta S. Sedis, vol. 40, p. 567).

Consultations were then held with the Commission for the Codification of the Canon Law, and a new *schema* of the decree was drawn up, which was discussed in full congregation (at which were present also Cardinal Vives y Tuto, and Monsignor Gasparri, Secretary of the Commission for the Codification of the Canon Law, as representatives of that body) on the 14th of July, 1906. Many amendments were made in this session and much was determined; but in matters of such vital importance, progress must necessarily be slow and deliberate. So the Cardinals ordered that a new scheme should be drawn up embodying the points decided upon so far, to be submitted at a later

meeting of the Congregation. This new scheme was laid before them on the 26th of January, 1907, and was corrected and amended, as also in the session of the 23rd of March, when the canon on Sponsalia was added. Once again the whole decree was brought up for final amendment and revision; and, after a labour of more than two years, in which the Cardinals of the Sacred Congregation of the Council, and of the Pontifical Commission for the Codification of the Canon Law, as well as the greatest experts in Ecclesiastical Law the Church possesses, were engaged practically without intermission, the decree received the approval of the Sovereign Pontiff, and was published on the 2nd of August, 1907.

Every clause, every section, every phrase, every word had been microscopically examined. The search-light of expert knowledge had so illuminated the whole decree and each of its parts, that no defect could escape detection. Many eagle eyes had been on the watch to discover imperfections, many bright intellects had been at work to suggest all possible improvements. No part of the decree escaped discussion and criticism. Every argument *pro* and *contra* was proposed, weighed and appraised at its due value. A great part of the time, labour and thought of the most learned Cardinals and of the finest Canonists of the Church during nearly two years and a half, has been devoted to this work, and the Sovereign Pontiff has given His approval to the result, " ex certa scientia et matura deliberatione."

This is the history of the decree *De Sponsalibus et Matrimonio*, on which I am venturing to comment (1).

---

(1) See Acta Sanctæ Sedis, vol. 40, pp. 531, ff.; vol. 38, pp. 208, ff.

THE PREAMBLE.

The two subjects dealt with by the present decree are *Sponsalia*, or betrothals, and Matrimony. The matrimonial legislation is concerned almost entirely (I say "almost," as there is a section treating of the registration of marriages) with the external form which is required by the Church for the validity of Christian marriage, or in other words, with the law against clandestinity. A clandestine marriage is, according to the technical definition of theologians, one which is contracted without the solemnity prescribed by the Church. This solemnity however is of two kinds, *accidental* and *substantial:* and the *accidental* solemnity is divided into *antecedent* and *consequent.* The *antecedent* solemnity consists in the public proclamation of the banns previously to the marriage, and its omission without dispensation granted by the competent authority renders the marriage illicit, but does not affect its validity. The *consequent* solemnity is the nuptial blessing which is given after the marriage has been contracted. While the Church strongly exhorts her children to receive this solemn blessing upon their marriage, she has not made it a matter of precept. It may therefore be omitted without sin; and in certain cases and at certain seasons it *must* be omitted. It is to this solemnity that the prohibition of solemnizing marriage at the forbidden times refers. The *substantial* solemnity of matrimony,

called *substantial* because it affects the validity of the contract, consists in the celebration of the marriage before the parish-priest and at least two witnesses. The absence of this solemnity makes the marriage clandestine. Clandestinity has always been an impedient impediment of matrimony, rendering the marriage illicit and gravely sinful unless a grave cause makes such clandestinity necessary; but the Council of Trent, in the exercise of the power bestowed upon the Church by her Divine Founder to impose conditions affecting the lawfulness and the validity of the marriage contract, and in view of the sacramental nature of the contract and of the grave difficulties which arose from clandestine marriages, declared clandestinity to be henceforth a diriment impediment of matrimony, rendering the contract null and void. The Tridentine law is as follows: "Qui aliter quam præsente parocho vel alio sacerdote de ipsius parochi vel Ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt, eos sancta Synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse decernit, prout eos præsenti decreto irritos facit et annullat." (Sess. 24, de Reform. Matrim., cap. 1). This law, however, though itself universal, was not by one single act of promulgation applied universally to the whole Church; but the Council decreed that it should be promulgated in each parish, and that it should not come into force till thirty days after such promulgation. The object of these provisions was the relief of heretics. For it was pointed out in the discussion of the Council by Father Laynez, S. J., that heretics would cer-

tainly not observe this new law, nor acknowledge their marriages, contracted without the solemnity required by the Church, to be invalid. Yet the marriages of heretics would undoubtedly be affected by the decree, so that the absence of the parish-priest would render them null and void, unless the Council specially exempted them. This the Council would not and could not do directly, but it applied a certain remedy to the difficulty by the clause requiring promulgation in each parish with thirty days' grace before the decree took effect. For if the promulgation was made or about to be made in a certain parish containing heretics, these could, if they had not already done so, form themselves into a separate religious body, which would naturally be considered alien from the Catholic parish, and would therefore not be involved in the promulgation of the new marriage law. The Council too foresaw that in places that were overwhelmingly or preponderantly heretical the decree would never be promulgated at all, so that the difficulties and consequences foreshadowed would not arise. In the localities, then, in which the decree of Trent has not been published, clandestine marriages have always remained valid. Thus in England marriages celebrated in the Protestant church, in the Nonconformist chapel, before the civil registrar, the private interchange of consent on the part of man and woman in the absence of witnesses, all which are clandestine marriages in the canonical sense, have always been valid, provided that no other diriment impediment existed.

But the fact that the Tridentine decree was not everywhere in force, and the consequent absence

of uniformity in the marriage discipline gave rise to further difficulties, which grew more and more grave as time went on, and the facilities of communication between different localities and countries increased. For example, the following is a practical case met with by missionaries in America. An Irish emigrant married a Protestant woman before the civil official in New York. After a time he left New York and his wife, and went to a distant part of the States, where he settled down and after a time married a Catholic, with whom he lived an edifying life for years. Finally during a mission his conscience was troubled with regard to his marriage. He had been well instructed in his religion in his native Ireland, where the law of Trent against clandestinity is in force, and knew that he should be married by the priest(1) and the marriage in New York having taken place only before the magistrate, he considered himself free to enter into the second matrimonial contract. He heard however for the first time at the mission that the presence of the priest was not necessary for the validity of the marriage which took place in New York. The difficulty is a grave one and one the solution of which requires all the prudence of the confessor. If he is able to decide that the man was fully (though falsely) persuaded, at the time of the first marriage, of the universal invalidity of matrimony in the absence of the priest, and that consequently the necessary intention and con-

(1) One can well underatand that even a well-instructed Catholic would not be aware that clandestine mixed marriages are valid in Ireland.

sent were lacking, he is well out of the difficulty. But if not —

Then again, the case is by no means unknown of two people leaving their home where the Tridentine decree is binding, and going to a place where that law is not in force, in order to be there married clandestinely. If they do not acquire at least a quasi-domicile, their marriage is invalid, for it is contracted *in fraudem legis.*

But the greatest difficulties are those arising from the necessity of the quasi-domicile for those who are bound by the Tridentine law, the difficulties, namely, which are described by Cardinals Richard and Kopp in their petitions to the Holy See quoted above (pp. 20-2), and which were the original motive of the present decree. One of the Consultors of the Sacred Congregation of the Council, Mgr Sili, thus sketches these difficulties in the *votum* which he wrote in preparation for the new decree: — " Quæ quidem incommoda, nostris hisce temporibus, plurimum aucta sunt. Cum enim aliquot abhinc annis in immensum excreverit numerus familiarum et singularum personarum præsertim operariorum qui, retento originario domicilio hac illac, intra vel extra Europam vagantur, accidit ut hi, nec juridice vagi nec certum aliud domicilium vel quasi domicilium habentes, difficile admodum juxta præsentem disciplinam valida possint matrimonia contrahere: quare aut illegitime conjunguntur, aut si parochum inveniant qui facile se æstimet eorum *proprius*, cum plerumque non sit — deficit enim in talibus fere semper animus manendi vel perpetuo vel ad majorem anni partem — specie utique valide contrahunt, re autem invalide. Quocirca S. C. Inq. et S. O. V.,

non semel consulti ab Episcopis vel singulatim vel in Concilia collectis, debuerunt, ut his semivagis providerent, indulta concedere quibus alicubi semestris, alibi vel sola menstrua commoratio, quin de animo manendi inquireretur, loco quasi domicilii foret in ordine ad matrimonium contrahendum." (Acta S. Sedis, vol. 40, p. 535-6).

These and similar considerations made it clear that the time had arrived for making a change in the matrimonial legislation of the Church with regard to clandestinity, so that henceforth there should be one uniform law throughout the whole Church. This change was really inaugurated nearly two years ago—to be exact, on the 18th of January 1906, when, by the Constitution *Provida*, Pope Pius X decreed that the clandestine marriages of Catholics were hence forward invalid throughout the German Empire, even in those places where the Tridentine decree had never been published, and that the clandestine marriages of heretics and clandestine mixed marriages were to be valid even where the decree of Trent was in force. This local law (with the exception of the clause relating to mixed marriages) now becomes, by virtue of the present decree, the universal law of the Church.

There is little to be said about the *Sponsalia*, and that little will be best said when commenting upon the articles of the decree.

THE DECREE

PART I.

ON BETROTHALS.

"I. — Ea tantum sponsalia habentur valida et canonicos sortiuntur effectus, quae contracta fuerint per scripturam subsignatam a partibus, et vel a parocho, aut a loci Ordinario, vel saltem a duobus testibus.

"Quodsi utraque vel alterutra pars scribere nesciat, id in ipsa scriptura adnotetur; et alius testis addatur qui cum parocho, aut loci Ordinario, vel duobus testibus, de quibus supra, scripturam subsignet."

*
* *

Sponsalia (Espousals, Betrothal, Engagement), are defined to be the mutual promise of future marriage. It is of the essence of *Sponsalia* that there be a deliberate *promise* and that this promise be *mutual*, not merely a promise on the part of the man, for example, while the woman has no intention of binding herself by a promise, though she accepts that made to her. *Sponsalia* therefore constitute a bilateral contract binding both parties under the obligation to fulfil the promise in due season. This obligation is one of justice, and binds the conscience under pain of grave sin.

The *Canonical Effects* of valid *Sponsalia*, besides the obligation just mentioned, to which should also be added the obligation of fidelity to each other, are chiefly two: viz., 1° the impedient impediment making the marriage of either of the parties with a third person unlawful, as long as the *Sponsalia* are not legitimately dissolved, but not invalid: 2°, the diriment impediment, called *publicæ honestatis*, absolutely invalidating the marriage of either of the betrothed with one of the blood-relations of the other in the first degree, that is, with mother, sister, or daughter, on the one side, and with father, brother, or son on the other.

With respect to the *External Form* of *Sponsalia*, the Church has hitherto imposed no conditions as necessary for their validity. Whether the *Sponsalia* were *solemn* (i. e., contracted in presence of the ecclesiastical authority) or *private* (i. e., without the intervention of the ecclesiastical authority), *public* (i. e., in the presence of witnesses) or *clandestine* (i. e., without witnesses), *written* or *verbal*, the Church has always accepted them as valid and as having their canonical effects, so long as the mutual promise was sufficiently expressed, and provided that no vitiating circumstance arising from another source existed.

One exception, however, must be made. King Charles III of Spain, early in the last century, decreed that *Sponsalia* were not to be considered as valid by the judicial tribunals of the Kingdom, unless they were confirmed by the written instrument of a public notary. This law, though only a civil enactment in its origin, acquired the force of a prescription of the canon law from the fact that

it was accepted and universally observed by the Church of Spain, and it was finally approved by the Holy See on the 31st of January, 1880. And though the civil law has since been repealed on this point, the Church has maintained this condition as necessary for the canonical validity of *Sponsalia* in Spain (Sacred Congr. of the Council, April 11th, 1891). It has also been extended to the Republics of Central and South America by the decrees of the Plenary Council of Latin America held in 1899 (*Acta et Decreta Concilii Plenarii Americae Latinae, tit. 5, c. 8*).

The fact, however, that the canon law required no special external formalities for the validity of *Sponsalia* has been the source of many difficulties. One of the most serious has been the difficulty of deciding in practice the question of the validity of private and clandestine betrothals. In principle, of course, they were, as we have seen, valid: but there is, if I am not much mistaken, a view which is very generally held among the clergy of England and America, that many of these betrothals suffer from an essential defect which invalidates them in the eyes of the Church.

The defect in question would seem to consist in the absence of a real *promise* properly so called. I can express it best, however, in the words of Marc (*Institutiones Morales Alphonsianæ*, II, n. 1951): "Nota. - Sæpenumero, promissiones futuri matrimonii quæ inter adolescentes sese invicem adamantes fieri solent, non sunt vera sponsalia, cum propositi potius quam contractus onerosi conditiones præ se ferant. Et ita est in illis præsertim regionibus, ubi est in more positum, ut sponsalia cum aliqua so-

lemnitate ineantur. — In praxi, ad intentionem promittentium maxime attendatur." This opinion is quoted with approval by Gasparri (*Tractatus Canonicus de Matrimonio*, n. 73), and Noldin (*De Matrimonio*, n. 536, b., B.). The following passage from Ballerini explains clearly the distinction which Marc makes between *propositum* and *promissio*. "Propositum et promissio in hoc differunt; quod 'propositum' etiam exterius expressum, solum est voluntas præsens aliquid postea faciendi, nulla sibi ad hoc nova obligatione imposita: unde licet alioquin propositum sit de re aliunde sub peccato debita, quale est propositum non peccandi, quod pœnitens in confessione habet; non tamen affert obligationem novam, quia proponens non intendit sibi aliquam aliam turpitudinem adjicere contra aliquam virtutem, si propositum non observet. Promittens vero non solum explicat propositum faciendi, sed intendit se aliquo modo ligare, ita ut si promissum non observet, id opponatur contra aliquam virtutem sive fidelitatis sive justitiæ." (Lugo, *de Just.*, disp. 23, n. 1).

"Exinde promissio definitur (vid. *Less.*, lib. 2, cap. 13, n. 2) 'deliberata et spontanea fidei obligatio facta alteri de re quapiam bona et possibili.' Gury V, 2, § 725, q. 4, monet sæpe videri negandum, quod promissiones de ineundo matrimonio sint habenda ut vera sponsalia; quia (inquit) illæ promissiones non raro speciem habent meri propositi et ideo spectandam intentionem sponsorum. Id verum erit, ubi promittentes ignorant naturam *promissionis*." (Ballerini-Palmieri, *Opus Theologicum Morale*, tract. X, sect. 8, *de Matrimonio*, n. 6).

Nevertheless (in saying what follows, I must be

understood to be merely explaining in what the difficulty and doubt consist, not to be attempting to decide the question), the usual formula by which a private betrothal is contracted, at least as far as England is concerned, viz., 'Will you marry me?,' or, 'Will you be my wife?' on the one part, and the answer 'Yes,' or, 'I will,' on the other, or some equivalent expressions, contains all the elements of a valid mutual promise. Thus Gasparri (op. cit., n. 80) says: "Est vera sponsalitia promissio... si partes dicant: *Coutraham tecum matrimonium, ducam te, accipiam te* [which is practically the customary English formula], quia licet hæc verba, in se spectata, significent potius voluntatis propositum, quam veram promissionem contrahendi matrimonium, tamen in communi loquendi usu important promissionem et sponsalia." And Ballerini hints (op. cit., n. 31) that it is hardly conceivable that a rational being can make a promise, without sufficiently realizing the obligation of fulfilling it: "Nescio an possibile sit inveniri eum qui capax est actus humani, et tamen nesciat promissioni conjungi obligationem faciendi promissa." *Sponsalia* therefore, contracted in the manner above mentioned, would seem to be valid *in foro externo*, in which only the *communis verborum sensus* has to be considered. — "Judex ergo in pronuntianda sententia hoc modo procedet: 1° Si verba signave mutuam promissionem significent ex se vel ex circumstantiis, pronuntiabit sponsalia valida (Ballerini, op. cit., nn. 75-6).

A strong confirmation of the validity of such *Sponsalia* is the fact that the usual English phrases employed to express espousals point most distinctly to the existence of a mutual promise with its con-

sequent obligation. "The *betrothed,*" "the *affianced* pair," "the *engaged* couple," are all expressions containing the same idea of plighted troth, faith and fidelity, of a promise and pledge to be fulfilled. Then, when we see the formula of betrothal quickly followed by the presentation and acceptance of the *engagement* ring, as a symbol of the bond which already unites the two *fiancés*, when the affianced couple are permitted that familiarity of intercourse which is customary between betrothed, when the announcement is made in the newspapers, with the consent of both parties, that "A marriage has been arranged and will shortly take place, etc.," — can we have any doubt that the intention of contracting *Sponsalia* in the strict sense of the term, is full and perfect?

Another confirmation of the validity of these *Sponsalia* may be found in the English civil law concerning breach of promise of marriage. The law, without doubt, regards an engagement as a real binding promise, and as a mutual or bilateral promise and contract, for though as a general rule the law is applied on behalf of the woman against the man who has broken his pledge, yet the legislation itself equally favours both man and woman, and may be and has been invoked successfully by the man as against the woman. (Of course I refer to the English law only as a means of ascertaining what is the common and general view as to the binding force of marriage engagements, not as in any way conferring that force, or as the source of their validity).

But perhaps a loop-hole can be found here. Does not the fact that the civil law is so rarely

invoked by the man against his faithless *fiancée*, point to a general opinion that while the man is strictly bound by his promise, chivalry and gallantry require that he do not hold the woman so bound? I do not think so. All that can be inferred from this is that chivalry and honour suggest that the man should not seek to inflict punishment upon the woman for her breach of faith.

This then is the *prima facie* case for the validity of *Sponsalia* contracted in the English manner. Still there is the certain fact that many of these betrothals are regarded as of doubtful validity, or even as absolutely invalid. Marc, when he states that the promise often has the nature of a purpose or intention rather than of a contract, makes the restriction that this applies *præsertim* to countries where *Sponsalia* are wont to be celebrated in solemn form. This is quite natural and reasonable; but still the remark does apply to many cases in those countries where private *Sponsalia* are the rule. But the great difficulty is to decide which are those cases; and the practical evils and dangers resulting from this difficulty are grave. The case of a man being successively engaged to two sisters is not so rare as it should be. If the first engagement was canonically valid, the second is invalid, and the marriage will be invalid on account of the impediment *publicæ honestatis*.

The undesirableness of private and clandestine *Sponsalia* on other grounds may be briefly expressed in these words of Marc (op. cit. n. 1951): "Dissuadenda tamen sunt sponsalia quæ solo contrahentium consensu, quin parentes vel testes assistant, contrahuntur, propter mala animarumque pericula quæ

ex iis oriuntur, ut discordiæ, scandala, seductiones, etc."

Accordingly, all private and clandestine *Sponsalia* are, by virtue of the present decree, declared to be canonically invalid. Henceforward *Sponsalia* will be valid only when they are contracted in writing, signed by both the betrothed, and by the the Parish-priest, or the Ordinary, or at least two witnesses. *Sponsalia* contracted with these formalities, and no other engagements of any kind, will be recognized by the Church, and will have the canonical effects, viz. the impedient impediment to marriage with any third person, and the diriment impediment *publicæ honestatis* to the marriage of one *fiancé* with a blood-relation in the first degree of the other.

It is to be carefully noted that the conditions of solemnity for the validity of *Sponsalia* are not quite the same as those of marriage. For *Sponsalia*, the Parish-priest, or the Ordinary, OR two witnesses are required; for Marriage the Parish-priest, or the Ordinary, AND two witnesses are necessary.

If either or both the parties to the *Sponsalia* be unable to write, this fact is to be noted in the document, and another witness is required to sign it, in addition to the Parish-priest, or the Ordinary, or the two witnesses.

I will conclude this section treating of *Sponsalia* with the following observations.

1° The Church does not impose any precept requiring that *Sponsalia* should be contracted previously to marriage: marriage is quite lawful without any *Sponsalia* at all.

2° Private and clandestine *Sponsalia*, verbal en-

gagements, are not prohibited or declared unlawful; but they are made canonically invalid. If contracted they will not be recognized by the Church, nor will they have any canonical effects.

3° It is, however, clearly according to the mind of the Church that private and clandestine engagements should be discouraged:

4° And that public and solemn *Sponsalia* should be encouraged. Génicot (Theol. Moral. II. n. 444, I.) thus sums up the advantages of *Sponsalia:* "Sponsalia congrue matrimonio præmittuntur, juxta morem quem Ecclesia, a Judæis, aliisque antiquissimis gentibus acceptum, jugiter tenuit. Juvat enim hoc quasi præludium matrimonii ut contractus quo vir et mulier se mutuo ad perpetuam et maxime intimam societatem juncturi sunt, maturius ineatur. Juvant etiam sponsalia ut christiani majore reverentia suscipiant matrimonii sacramentum, cui velut quædam sacramentalia præmittuntur. (S. Th. 4. dist. 27. q. 2. a. 1)."

PART II.

ON MARRIAGE

CHAPTER I.

THE SUBSTANCE OF THE LAW.

" II. — Nomine parochi hic (1) et in sequentibus articulis venit non solum qui legitime præest paroeciæ canonice erectæ; sed in regionibus, ubi paroeciæ canonice erectæ non sunt, etiam sacerdos cui in aliquo definito territorio cura animarum legitime commissa est, et parocho æquiparatur; et in missionibus, ubi territoria necdum perfecte divisa sunt, omnis sacerdos a missionis Moderatore ad animarum curam in aliqua statione universaliter deputatus. "

" III. — Ea tantum matrimonia valida sunt, quæ contrahuntur coram parocho vel loci Ordinario vel sacerdote ab alterutro delegato, et duobus saltem testibus, juxta tamen regulas in sequentibus articulis expressas, et salvis exceptionibus quæ infra n. VII et VIII ponuntur. "

---

(1) I have placed the title " On Marriage " in front of this article of the Decree, for the convenience of the commentary — in order that the full explanation of the term *parochus* may be found in one place. The word *hic* in this article refers to art. 1, *de Sponsalibus*.

In these terms the new general law of the Church concerning the external form required for the validity of the marriage contract, is enunciated. Certain conditions which must be fulfilled to secure the validity of the external form, others which are required for the licit celebration of the rite, and some derogations from the law permitted in extraordinary and exceptional circumstances, are contained in subsequent articles and will be dealt with in their proper places. Our immediate concern is with the substance of the law.

The present article of the decree, then, provides that only those marriages are valid that are contracted before the parish-priest, or the Ordinary, or the delegate of either, and at least two witnesses. (I use the term *parish-priest* as the equivalent, sufficient for all practical purposes, of the Latin *parochus:* though any cleric who has completed his twenty-fourth year may be lawfully appointed a *parochus*. He must however receive the priesthood within twelve months. A *parochus* not yet ordained priest may validly and licitly assist at the celebration of marriage. Gasparri, op. cit., n. 1096).

The first point that I desire to bring to the notice of my readers is one of extreme importance for the understanding of the whole of this legislation. It is this; that the *substance* of this marriage law in no wise differs from the *substance* of the legislation of the Council of Trent on the same subject. This will appear at once from a comparison of the text of the decree of Trent with that of the article recited above. The Council of Trent (sess. 24, *de Reform. Matrim.*, cap. 1) decreed: "Qui aliter quam præsente parocho vel

alio sacerdote de ipsius parochi vel Ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt, eos S. Synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse decernit, prout eos præsenti decreto irritos facit et annullat." Here we have precisely the same conditions laid down for the validity of marriage, as in the decree at present occupying our consideration. The Church is not making any revolutionary or drastic changes in her constitution or laws; she is only simplifying and unifying her legislation.

Further, the decree of Trent was universal in its scope and in the intention of the Council, as is that of Pius X; for it says: "Ne vero hæc tam salubria præcepta quemquam lateat, Ordinariis omnibus præcipit ut cum primum potuerint, curent hoc decretum populo publicari, etc." But it is in this publication or promulgation of the law that the main difference between the two decrees lies. The Council of Trent ordained that its decree should be published in each parish, and should come into force thirty days after such publication; so that the extension of the law was in fact greatly restricted by the omission of publication in many parishes. The new decree makes no such condition; but provides that its transmission to the Ordinaries shall be held to be sufficient publication and promulgation, and that it shall come into force automatically and universally on Easter-day, 1908. This is the principal difference between the old and the new legislation, and we shall see, as we go on, that much that at first sight appears to be new in the decree of Pius X, is not really so, but is rather

intended to make explicit what was already implied in the old legislation. Not that there are no differences save that just noted. There are other and important modifications; but, as I have said, the substance of the law remains unchanged, as well as many of its attendant circumstances and conditions.

This substantial identity of the two laws necessarily implies that the terms common to both, — Parish-priest, Ordinary, Witness, — have the same signification in the new as in the old. It is true that the new decree contains an authoritative interpretation of the term *Parish-priest* to the following effect: "Here and in the following articles, by the term *parish-priest* is to be understood not only the lawful pastor of a canonically erected parish, but also, in countries where there are no canonically erected parishes, the priest to whom the cure of souls has been legitimately entrusted in any specified district, and who is equivalent to a parish-priest; and in missions where as yet there are no clearly defined territorial divisions, all priests who are appointed by the Superior of the mission to the universal cure of souls in any station." (See the Latin text at the head of this chapter). It is clear, however, first of all, from the wording of this clause ("not only," "but also") that no limitation of the meaning of the term is intended. Rather, if anything, the object would be to extend its signification. But we shall see that the clause in question only incorporates into the body of Canon Law the authentic interpretation of the Tridentine decree which the Holy See, through the decisions of the Holy Office and the Sacred Congregation of the Council, has

given in the past and has consistently acted upon in its practice. It is necessary, therefore, to ascertain the meaning of the term *parish-priest* according to the mind of the Council of Trent.

§ 1.

The Parochus.

Gasparri (op. cit., n. 1075) lays down the fundamental principle that the term *parochus* in the decree of Trent is used in a wide sense, to include both the canonical parish-priest and any other priest who has the universal cure of souls in any parish. Hence the following come within the meaning of the term *parochus* as used by the Council of Trent in the decree against clandestinity:

1° *All Parish-priests*, whether irremovable or removable;

2° A *Perpetual Vicar* who has full charge of a parish and rules it on behalf of the titular parish-priest, chapter, etc., and therefore is for all practical purposes equivalent to a parish-priest;

3° The *Administrator of a vacant parish;*

4° A *reputed parish-priest (parochus putativus)*, i. e. one who has received appointment to the parish from his lawful superior, and is therefore commonly reputed to be its true pastor, though his appointment is invalidated by a hidden defect. He therefore has what is called a *titulus coloratus*, which, in conjunction with the general error as to the validity of his tenure of the office, is sufficient for the validity of the marriage contracted in his

presence, the Church supplying whatever is lacking on his part. This, however, does not apply to an *intruded* parish-priest, i. e. one appointed by unlawful and incompetent authority, e. g. the authority of the State, without the consent of the legitimate ecclesiastical Superior, as happened in the case of the Constitutional Clergy of France at the end of the eighteenth century, and in Germany during the Kulturkampf. Marriages contracted before such imposters are unlawful and utterly invalid.

5° *The Rector of a quasi-parish*, i. e. the duly appointed resident pastor of an ecclesiastical district, which though not a canonically erected parish, has its fixed and definite boundaries by which it is marked off from the adjoining districts. As the district is a quasi-parish, so its Rector is a *quasi-parochus*, and for the purposes of the clandestinity decree of Trent a *parochus*, for he is appointed to perform all parochial duties without any restriction. This was decided by Pius VII, on the 17th of May, 1804 for the marriages of Catholics in Holland, where there were no parish-priests in the strict and canonical sense of the word, but missionaries: "Parochum proprium catholicorum in Hollandia commorantium ibi matrimonium inter se contrahere volentium, esse pastorem vel compastorem illius civitatis vel loci, in quo alteruter ex contrahentibus domicilium vel quasi domicilium habet: ideoque nonnisi coram illo vel alio sacerdote de illius licentia valide posse matrimonia copulari" (Ballerini-Palmieri, op. cit., n. 1217). Hence Kenrick (*Theol. Mor.*, t. 2, tr. 21, n. 185) says: "Opus non est ut jura omnia parochi habeat sacerdos: sed satis est ut prope Ecclesiam commorans, parochi instar, curam

animarum gerat, prout rescripsit S. Sedes, 17 Maii 1804, de Hollandiæ Sacerdotibus" (ap. Ballerini-Palmieri, n. 1182).

A more recent decree, however, viz. the declaration of the Holy Office for the province of Quebec, 14th Nov. 1883, carries us still further. For by order of the Bishops of the province the Tridentine decree invalidating clandestine marriages had been promulgated both in the quasi-parishes or districts having resident pastors, and in the missions which were only visited by a priest from time to time on his round. The Holy Office was therefore asked to decide whether such promulgation was valid: "An valida fuerit promulgatio decreti *Tametsi* Concilii Tridentini in missionibus et quasi-parochiis supra dictis?"

The answer was: "Juxta exposita (1) *affirmative* et ad mentem. Mens est, quod in locis, ubi haberi nequeat parochus, validum est matrimonium celebratum coram duobus testibus; contrahentibus tamen onus inest recipiendi, quam primum id fieri possit, benedictionem nuptialem, et curandi, ut eorumdem matrimonium inscribatur in sacramentali registro

---

(1) The *exposita* are as follow: "Episcopus S. Hyacinthi in regione Canadensi S. Congregationi Inquisit. exponit, quod nunc oriuntur dubia de validitate quorumdam matrimoniorum, sine solemnitate a decreto *Tametsi* Concilii Tridentini requisita, contractorum in missionibus vel quasi parochiis hujusce Diœcesis. Ante enim annum 1872 multa loca Diœcesis S. Hyacinthi, *Cantons* nuncupata, non erant adhuc in parochias canonice divisa. His in locis aderant: 1. Missiones proprie dictæ, scilicet sine sacerdote residente; sed a missionario, ad hoc delegato, temporibus tum fixis, tum inæqualibus, per annum visitatæ. 2. Quasi parochiæ,

missionis vel proximioris ecclesiæ, cui subjiciuntur" (*Acta Sanctæ Sedis,* vol. 17, p. 351). It follows from this decision that the priests in charge of districts (quasi-parishes) and missions, with full faculties for the discharge of all the duties of the ministry, are *parochi* in the sense of the Tridentine decree. For in these localities, if the decree of Trent had been there promulgated, marriages would be invalid unless contracted in the presence of the *parochus,* at any rate under ordinary circumstances, that is, unless the marriage had to be celebrated during his prolonged absence. Consequently, in each district and mission there must be some person who is the *parochus* for the purpose of the celebration of marriage according to the requirements of the Council of Trent: and this can be no other than the priest to whom the cure of souls in that locality has been committed.

Hence 6°. In missions, *all Priests appointed to the universal cure of souls in any station* come within the meaning of the term *parochus.* Referring to the decree of the Holy Office quoted above, Génicot (op. cit., n. 499) says: "Quamvis requiratur publicatio in singulis paroeciis facta, non propterea censenda est invalida ubi nondum canonice erectæ sunt paroeciæ, dummodo fiat in singulis

---

per quas intelligi debet territorium quod, quoad speciem externam, plus vel minus accedebat ad similitudinem parochiæ, prout habens Ecclesiam, prope quam sacerdos ordinarie vel saltem principaliter residebat, et limites ab Episcopo designatos. Attamen in his missionibus et quasi parochiis, sicut et in parochiis proprie dictis, decretum *Tametsi* Concilii Tridentini fuerat quotannis publicatum a sacerdotibus earum curæ præpositis." (Acta S. S., loc. cit.).

quasi-paroeciis vel etiam territoriis quæ certi cujusdam missionarii curæ demandantur, ut liquet e resp. S. Inqu. 14 Nov. 1883 ad episc. S. Hyacinti."

It is clear, therefore, that the clause in the decree of Pius X explanatory of the term *parochus* has introduced no change in the signification of the word as used by the Council of Trent.

To sum up what has been said so far: "Nomine parochi intelligitur qui proprio nomine curam animarum actu exercet, etsi cura habitualis sit apud alium, e. g. capitulum, vel parochiæ nondum sint canonice erectæ" (Noldin, op. cit,, n. 646. 1°).

***

There is one other class of parochial clergy whose claim to the title of *parochus* remains to be discussed. I refer to the coadjutors or assistants of the parish-priests and rectors, to all those who, by a singular inversion of the true and canonical signification of the word, are commonly called in English "curates." (The "curate" is, properly speaking, he who is charged with the cure of souls. Hence in France the *curé* is the parish-priest, while his assistant is called the *vicaire;* in Italy the parish-priest is the *curato*, and his coadjutor the *sotto-curato*, expressed in Latin by *vice-curatus, vice-parochus, pro-parochus*, *vicarius*, *coadjutor*). I prefer, therefore, to use the word "coadjutor" rather than "curate" for the assistants of parish-priests and rectors of districts. The question then is: May a coadjutor be considered to be a *parochus* in the sense of the Tridentine decree?

We have for our guidance four decisions of the Sacred Congregation of the Council (see Gasparri, op. cit., nn. 1086-7). The first is recorded by Fagnani, c. 2. de Clandest. Desp. n. 33: "Præpositus ecclesiæ Armacanæ inter cetera dubitavit, cum ipse constituisset vicarium in dicta ecclesia posteaque illi dedisset coadjutorem, de cujus licentia quidam sacerdos matrimonio contrahentes conjunxit, an matrimonium hoc modo celebratum sit validum? S. C. dixerat non sufficere ad validitatem matrimonii licentiam tacitam quæ resultat ex tolerantia; sed requiri vel licentiam generalem administrandi omnia sacramenta, vel, si hæc non adsit, expressam et specialem. Ita Rota dixerat in una *Barcinonen.* vicarios temporaneos ad nutum amovibiles parochialis ecclesiæ posse matrimoniis *tamquam parochos* interesse. Ideoque in casu praesenti S. C. sensit posse et matrimonio interesse et alii dare licentiam ut intersit, hujusmodique matrimonia esse valida."

Secondly, the Bishop of Bosa in Sardinia, when making his visit *ad Limina Apostolorum* in 1789, explained to the Sacred Congregation the following facts. It was the custom in that island for the Bishops to appoint coadjutors on the presentation of the parish-priests, with full powers to perform all parochial functions — "absolute, plene et absque ulla ministerii parochialis restrictione." His predecessor, however, had in 1781 made a synodal decree withdrawing from the coadjutors of the diocese the power of assisting at the celebration of marriage, unless they had the special delegation of the parish-priest in writing for each particular case: — "Pro-parochos, nisi specialem a parocho pro casu particulari facultatem in scriptis acceperint, assistere

matrimonio minime posse, *subtracta eisdem amplissima, quæ vulgo concedi solet, matrimoniis assistendi potestate.*" The Bishop, being in doubt as to the validity of this synodal decree, proposed the following questions to the S. C. for solution: — "1° An et quomodo sustineatur synodale decretum in casu; 2° An per idem decretum adempta sit pro-parochis potestas assistendi matrimoniis, ita ut irrita sint matrimonia coram ipsis celebrata in casu; 3° An iterari debeat matrimonium coram pro-parocho celebratum contra formam ejusdem decreti in casu?" The Sacred Congregation replied: "Ad 1^um^ affirmative; ad 2^um^ affirmative ad primam partem, negative ad secundam; et matrimonia inita cum assistentia pro-parochi contra formam decreti synodalis esse valida sed illicita; ad 3^um^ negative." According to this decision, therefore, the effect of the synodal decree quoted above was only to render the assistance of coadjutors, without delegation from the parish-priest, at the celebration of marriage, illicit, not invalid: so that as long as they retained their office, they could validly act as the *parochus* in the sense of the Tridentine decree for the celebration of matrimony. — "Ex hac responsione patet manifeste pro-parochos illos, semel eo modo positos, habere tamquam parochos assistendi potestatem a Concilio Tridentino, donec in suo officio relinquantur, quam proinde Episcopus synodali suo decreto auferre eisdem minime poterat" (Gasparri, loc. cit.).

This decision, however, does not completely answer our question. We have got as far as this, that coadjutors appointed with the plenitude of the parochial ministry are *parochi* within the meaning of the Tridentine decree. But out of the decision

just quoted arose another series of queries and replies which illustrate the other side of the question. The Archbishop of Sassari in Sardinia considered that his suffragan, the Bishop of Bosa, had not accurately stated the facts on which the decision of the Sacred Congregation was based. He maintained that the custom of instituting the coadjutors with unrestricted parochial powers did not obtain n Sardinia, and particularly in his own diocese. He explained their position to be one of entire dependence upon the parish-priest as regards the extent, the limitation and the exercise of their parochial functions. — " Sunt nempe pro-parochi sacerdotes, quos parochi seu rectores in partem laboris sibi pro tempore adsciscunt, prævia tamen Episcoporum approbatione, nimirum ut eligantur viri qui morum integritate et sufficienti doctrina pro locorum ratione et populorum necessitate præditi sint, eisdemque parochis in explendo pastorali munere subsidio atque adjumento esse valeant. Horum itaque facultas a parochorum voluntate tota pendet, qui pro diversis locorum, personarum ac temporum adjunctis, juxta leges ac peculiaria statuta, restringere aut ampliare solent." The Archbishop therefore put to the Sacred Congregation a set of questions similar to those of the Bishop of Bosa: — " 1° An prudenter et salubriter legem ferat episcopus in synodo vel extra synodum, qua vetentur parochi illimitatam facultatem matrimonio assistendi sacerdotibus coadjutoribus seu pro-parochis concedere; 2° An matrimonia, coram ejusmodi pro-parochis celebrata, non modo illicita, verum etiam invalida censenda sint; 3° An validum sit matrimonium nostri casus [i. e. celebrated in the presence of a coadjutor]?" The

final decision of the Sacred Congregation was given on the 19th. of December, 1795, and was, of course, based upon the new facts as stated by the Archbishop: — "Affirmative quoad primum dubium; quo vero ad secundum, esse valida, quatenus fuerit a parocho delegatus, sed illicita; quo vero ad ter tium, in decisis" [i. e. affirmative, on the supposition of delegation by the parish-priest]. If then the coadjutor is appointed with full powers — "ad universitatem causarum" — he may validly assist at marriages without the delegation of the parish-priest and of his own right, nor can this power be withdrawn either by the Bishop or the parish-priest, as long as the coadjutor remains in his office, though the prohibition of his superior will make his presence at marriage *illicit* (cf. Gasparri, n. 1092-4): if, on the other hand, he is appointed to perform only those duties which are committed to him by the parish-priest and under his direction, he can assist at the celebration of matrimony only as the latter's delegate. Gasparri thus sums up the two decisions: — "Ex hac responsione sequi evidenter videtur vicarios parochi præsentis et valentis, si quidem cum plenitudine ministerii pastoralis positi sunt, prouti Episcopus Bosanensis exposuerat, jure proprio matrimoniis assistere: sed si positi sunt ita ut parochum adjuvent in his quæ eis committuntur, uti Archiepiscopus Turritanus narrabat et fieri solet ac praesumitur, non posse matrimoniis adesse, nisi ex licentia seu delegatione." (n. 1087).

Finally the decree of the Sacred Congregation of the Council, 19th. of April, 1834, in Cenetensi Matrimonii, ad 5^{um} is to the same effect, viz. that coadjutors appointed without full and independent

powers require the delegation of the parish-priest to assist validly at the solemnization of marriage (ibid.).

Similarly Génicot (op. cit. II n. 71 III): — "Quandoque coadjutoribus per episcopi decretum generaliter committuntur cura animarum et administratio sacramentorum: quo facto, possunt, absque delegatione sui parochi, valide matrimoniis assistere et subdelegare tamquam delegati ad universitatem causarum. Sed quandoque parocho committitur ut eis concedat eas tantum facultates quas expedire judicaverit: quo in casu, nihil possunt nisi quod ipsis expresse vel tacite concessum fuerit."

Noldin explains the matter thus (op. cit. n. 648, d, a) "Res inde pendere videtur, num ab episcopo ad exercendam curam universam eamque independenter, an vero dependenter a parocho mittatur." This however does not seem to go to the root of the matter, for the coadjutor may be dependent on the parish-priest only as regards the licit or illicit, not the valid or invalid exercise of his functions.

The distinction made between coadjutors appointed with full powers and those appointed with limited faculties, together with the differences of discipline in various localities, reconciles the apparently contradictory views of some theologians and canonists on this point; as, for example Bucceroni (Theol. Moral. II. n. 244. ad 2.): "Vicarius merito censetur delegatus ad causarum universitatem, nisi in aliquibus locis ejus delegatio restringatur. Vicarius enim ab ipso episcopo constituitur ut parochum in omnibus adjuvet, ipsumque suppleat:" and De Becker (De Sponsalibus et Matrimonio, p. 101): "Nequaquam sub nomine parochi veniunt

vice-parochi, rectores vel capellani seminariorum, collegiorum, hospitalium, copiarum militarium: qui omnes sine indulto apostolico vel expressa Episcopi vel parochi delegatione, ad matrimonio assistendum jus nullum habent." For in Belgium (De Becker writes at Louvain) coadjutors are not appointed with full and absolute power:—"Pro Belgio negat Feije, n. 266," says Gasparri, n. 1088.

As regards practice, it may not be presumed that the coadjutor is appointed with full and absolute powers, but rather the contrary;—"Notandum *vicarium*, etc., duplici modo in parochia constitui posse, scilicet vel ita ut plenam habeat in parochia potestatem et a parocho dependeat tantum in exercitio licito vel illicito potestatis; vel ita ut unam habeat potestatem audiendi confessiones et quoad cetera parochum adjuvet in iis quæ ille eidem committit. Cum vero primus modus minus expediat, *hinc in dubio præsumitur alter, qui de facto plerumque servatur,* dum parocho præsenti et valenti datur vicarius coadjutor seu auxiliator" (Gasparri, n. 1085. Italics mine). The custom of each diocese must be ascertained, and it is for the Ordinary to say what are the powers which he confers on coadjutors when they are appointed. — "Quilibet Ordinarius sciet profecto quacum potestate vicarios constituit; unde in qualibet diœcesi facile erit quæstionem dirimere" (Gasparri, n. 1088). "Episcopus Passaviensis 4 Oct. 1897 declaravit sacerdotes, qui curam auxiliarem in diœcesi exercent, eam dependenter a parocho exercere, ideoque sine speciali ejus delegatione matrimoniis valide assistere non posse" (Noldin, loc. cit., not. 3). "In Germania ii qui sunt parochi adjutores, vicarii et capellani,

sine dubio per se non habent potestatem matrimonio assistendi, sed *speciali* delegatione indigent" (Lehmkuhl, n. 777, 3°): and we have seen that the same holds good for Belgium. In the Synodal Statutes of the diocese of Paris, an. 1902, art. 446, it is provided that the senior *vicaire* has faculties *ad omnia negotia matrimonialia*, and is therefore *parochus* in the sense of the Tridentine decree (Gasparri, n. 1132). As regards English-speaking countries no general rule can be laid down, but I think it will be found that the coadjutors are not usually appointed *cum plenitudine pastoralis ministerii.* This is obvious where the diocesan rule exists that the Rector is the proper person to deal with marriages and to treat with the Bishop on matrimonial cases, dispensations, etc. For instance in the diocese of Birmingham (England) "Rectoris Ecclesiae est matrimonia et causas matrimoniales tractare; ita ut in quaerendis dispensationibus, petitio ejus nomine fieri debeat, etc." However, it will be for the Ordinary to explain to the clergy the extent of their powers when the new marriage legislation comes into operation.

To sum up the whole question:—"Quæstio huc redire debet, utrum vicarii positi in parochia sint cum plena et absoluta potestate, an potius ut parochum adjuvent in his quae eis demandantur. Si primum, assistere valide poterunt, quia sunt parochi in sensu decreti; si alterum non poterunt" (Gasparri, n. 1088).

The same principles apply to chaplains of hospitals, prisons, military chaplains, etc. "Videtur capellanus, nisi parochus sit, aut legitime delegatus, jure proprio assistere nullo modo posse. In nonnullis

diœcesibus capellanus de facto est ab Ordinario delegatus ad parochialia omnia munera in hospitali [or prison, etc.]: et tunc capellanus valide utique assistit" (Gasparri, n. 1112). "Capellani militares saepe habent ab Apostolica Sede privilegium administrandi omnia parochialia sacramenta, proindeque etiam assistendi matrimoniis militum et aliarum personarum eis inservientium. Tunc igitur necesse erit perpendere et sedulo servare limites hujus privilegii" (ib. n. 1111).

This however is without prejudice to the rights of the territorial *parochus,* who may validly assist at all such marriages.—"Licet capellani ex privilegio possint militum matrimoniis assistere, tamen eorum potestas non est privativa, sed cumulativa cum aliis parochis qui potestatem assistendi ex jure communi habent" (ib. n. 1111).

The coadjutor of a *parochus* incapacitated by illness, infirmity or old age, or absent for a prolonged period, or under the censure of excommunication *nominatim* or suspension, is considered to be invested with full parochial powers, and therefore validly assists at the celebration of marriage (Gasparri, nn. 1078-1081: New Decree of S. C. C. de Sponsalibus et Matrimonio, IV, § 1°).

Therefore, to use the words of Mgr Pezzani, a member of the Commission for the Codification of Canon Law, in an article on the new Decree (*Il Consulente Ecclesiastico*, August, 1907, p. 258): "By *parochus* is understood in general any priest to whom the general cure of souls has been entrusted by his lawful superior." ("Per *parroco* s'intende in genere qualunque sacerdote cui sia stata affidata la cura generale delle anime, come il par-

roco in senso stretto, l'Economo spirituale, il quasi parroco, il missionario deputato, ecc.").

§ 2.

The Ordinary.

The Council of Trent in its decree on Clandestinity does not expressly mention the Ordinary as one who is qualified to act as the representative of the Church at the celebration of marriage. It speaks only of the *parochus* and the delegate, in this connection. But that the Ordinary is included in the term *parochus*, both as a matter of fact and according to the intention of the Council of Trent, is absolutely certain. For first, by *parochus* is meant anyone who actually exercises in his own name the cure of souls. And certainly the Ordinary possesses parochial jurisdiction and discharges the duties of the cure of souls in a higher and more eminent degree than the parish-priest himself.—Moreover, the Tridentine decree does explicitly mention the Ordinary as one who has the right equally with the parish-priest to delegate another priest to assist at the celebration of marriage. Consequently he has the right to assist in his own person, according to the rule of the Canon Law that no one can transfer to another rights which he does not possess himself: « Nemo potest plus juris transferre in alium quam sibi competere dignoscatur » (regula 79 juris, in 6.°—Gasparri, n. 1115): —a rule which is only an application to the canon law of the universal principle: « Nemo dat quod uon habet ».

It may be of advantage to make here a slight digression, in order to explain what is the exact position or status of the parish-priest, Ordinary, or delegate, at a marriage.

In the first place, it is now quite certain that the priest is not the minister of the Sacrament of Matrimony. The opinion, for which Melchior Canus (1) was responsible, that the priest administers the Sacrament, and that the form consists in the blessing of the marriage by the priest (i. e. the words « Ego conjungo vos in matrimonium in nomine Patris et Filii et Spiritus Sancti »), has lost all probability, and has become antiquated and obsolete, in consequence of the explicit teaching of Pius IX and Leo XIII on the point. For in Christian marriage the Sacrament and the contract cannot be disassociated or separated from each other. In fact the contract of marriage between two baptized persons *is* the Sacrament.

This is clearly taught in the *Syllabus* of Pius IX, which contains the two following condemned propositions: « Matrimonii sacramentum non est nisi quid contractui accessorium ab eoque separabile, ipsumque sacramentum in una tantum nuptiali benedictione situm est » (prop. 66): and: « Falsum est, aut contractum matrimonii inter christianos semper esse sacramentum, aut nullum esse contractum, si sacramentum excludatur » (prop. 73). The same Pope in an Allocution, 27th of September, 1852, said: « Nemo ex Catholicis ignorat, aut ignorare potest matrimonium esse vere et proprie unum

(1) De Locis Theologicis, l. VIII, c. 5.

ex septem Evangelicae Legis sacramentis a Christo Domino institutum, ac propterea inter fideles matrimonium dari non posse, quin uno eodemque tempore sit sacramentum ». In like manner Leo XIII, in his Encyclical *Arcanum*, on Christian Marriage, teaches: « Christus Dominus dignitate sacramenti auxit matrimonium; matrimonium autem est ipse contractus, si modo sit factus jure. Huc accedit, quod ob hanc causam matrimonium est sacramentum, quia est sacrum signum et efficiens gratiam, et imaginem referens mysticarum nuptiarum cum Ecclesia. Istarum autem forma ac figura illo ipso exprimitur summae conjunctionis vinculo, quo vir et mulier inter se colligantur, quodque aliud nihil est, nisi ipsum matrimonium. Itaque apparet, omne inter christianos justum conjugium in se et per se esse sacramentum; nihilque magis abhorrere a veritate quam esse sacramentum decus quoddam adjunctum, aut proprietatem allapsam extrinsecus, quae a contractu disjungi ac disparari hominum arbitratu queat ». Hence it follows that the contracting parties themselves are the ministers of the Sacrament to each other, and this is theologically certain; for they are undoubtedly the ministers, if the word may be used in this connection, of the contract, which is itself the Sacrament.

The part of the priest, as far as concerns the validity of the marriage, is rather a passive than an active one. He exercises no act either of jurisdiction or of Order or of administration. But since the Church insists that her children shall enter into the contract of marriage and receive the Sacrament of Matrimony in her presence and with her sanction, she has enacted that the parish-priest,

either personally or by his delegate, shall assist at the marriage as her representative, as the official, public, ecclesiastical witness, the *testis qualificatus* or *auctorizabilis*. For, though the presence of the parish-priest is not an act of jurisdiction, still the Church requires that her official witness to the marriage shall be qualified by the possession of spiritual jurisdiction, or at least of the office to which spiritual jurisdiction over the contracting parties is attached. And it is only fitting that the pastor, the spiritual father, should be the official representative of the Church at this solemn religious act of his spiritual children.

The priest, however, is the minister of the sacred ceremonies which constitute the *rite* of Matrimony as distinct from the essence of the contract and Sacrament. He imparts the blessing of the Church, etc.: but the validity of the Sacrament is quite independent of these ceremonies.

To return to the discussion of the subject that more immediately concerns us now, I may note, first of all, that the new decree explicitly names the Ordinary as a qualified official witness of marriage. Under the term *Ordinary* are included the following:

1° The Pope; 2° Archbishops and Bishops in their dioceses; 3° other Prelates who have separate quasi-episcopal jurisdiction over a certain territory; 4° Vicars-General; 5° Vicars-Capitular, *sede vacante*.

1° The Pope is the Ordinary Pastor of the Universal Church, as was defined by the Vatican Council (sess. 4, cap. 3); and therefore has the right to assist at the marriages of any of the faithful in any

part of the world, either personally or by his delegate. Pope Leo XII made express declaration that the Roman Pontiff possessed this right, in his Apostolic Letter to the Swiss, dated the 4th of October, 1828. It is, too, a power which the Popes have repeatedly exercised. Bangen (tit. III, p. 15) records that it has frequently happened that couples whose marriage was prohibited by the civil law of their own country, have gone to Rome and have there been married in virtue of a special delegation of the Pope (ap. Gasparri, n. 1117) (1).

2° *a*) An Archbishop (Metropolitan) may always, of course, validly assist at marriages in his own diocese. But besides this, he has the same right in the diocese of a Suffragan during the time of actual visitation of that diocese; and also in the case of an appeal to the Metropolitan's court from the judicial decision of a Bishop prohibiting a marriage. In this latter case, however, the Archbishop acquires the right, only when his judicial sentence reversing the Bishop's decision has been accepted by both sides as the definite adjudication of the cause; he may then act as the Ordinary with re-

---

(1) It should be noted that such marriages have been valid in Rome, not because the Pope is the local Ordinary of the diocese of Rome, but because he is the *Ordinarius proprius* of all Christians; and they would have been equally valid in any other part of the world, if celebrated in the presence of the Pope's delegate. If the Pope were not the universal, as well as the local Ordinary, these marriages even in Rome would have been clandestine and invalid. Henceforth, however, every *parochus* and Ordinary will be able to assist validly at such marriages in their own territory (see Decree, IV, § 2).

spect to the marriage, either being present himself, or delegating a priest to represent him. But until his judgment has been received by all as the final conclusion of the case, or if a further appeal is made to the Holy See, the Metropolitan has no power to assist at the marriage (Gasparri, n. 1118).

b) Bishops in their dioceses. There is a very important point concerning the limitation to their own territory of the right of the Ordinary and the parish-priest to assist at marriages, so that they cannot, as heretofore, assist in another diocese or parish, as the case may be, at the marriages of their own subjects. This matter, however, belongs to the next article of the decree, under which it will be fully discussed.

3° Other Prelates who have separate quasi-episcopal jurisdiction over a certain territory, as for example Apostolic Administrators, Vicars-Apostolic, Prefects-Apostolic, Abbots with separate territorial jurisdiction.

4° Vicars-General, for they also possess ordinary jurisdiction throughout the diocese. "Vicarius Generalis, aeque ac contrahentium parochus, ex proprio officio et facultate sibi a Concilio Tridentino tradita, sess. XXIV, cap. 1 de ref., potest absque speciali Episcopi commissione matrimoniorum celebrationi interesse, aliique simplici sacerdoti licentiam illis assistendi concedere, iuxta communem sententiam quam tuentur adducti per Sanchez... Et constat tum ex rescripto S. C. sub die 4 Julii 1602 in causa quadam matrimoniali in haec verba edito: S. C. censuit coram Vicario Generali Episcopi matrimonium contrahi posse perinde ac coram parocho, ut in lib. 10 Decr., pag. 36; tum ex al-

tero emanato in Taurinensi Matrimonii, 26 Sept. 1697, etc." (Folium S. C. in Segnensi Matrimonii, 12 Nov. 1736: Gasparri, 1120).

The assistance of the Vicar-General is valid even in spite of the prohibition of the Bishop, "quia in re et ad effectum de quo agitur, Vicarius-Generalis venit nomine Ordinarii" (Votum S. C. C. in causa Pistoriensi, 22 April, 1719).

5° If the Bishop dies, resigns, or otherwise vacates his See, the office and jurisdiction of the Vicar-General expire, according to the axiom of the Canon Law: "The Vicar-General dies with the Bishop." He, therefore, can no longer validly assist at marriages as the Ordinary, except in the case of a common error that he still retains his office, in which case the Church makes good the defect (Gasparri, n. 1120). When the Episcopal See is vacated, the ordinary jurisdiction of the Bishop passes to the Chapter, and from the Chapter to the Vicar-Capitular, who must be elected by that body within eight days. The Vicar-Capitular therefore is the Ordinary until the See is once more filled, and as such validly assists at the celebration of matrimony in the diocese. So also a marriage would be valid at which the Chapter, *sede vacante* and before the election of the Vicar-Capitular, assisted *capitulariter*, either personally or by their delegate. Single canons, however, could not thus act as the Ordinary, but only as the delegate of the whole body; and if the whole Chapter assisted *capitulariter*, two additional witnesses would be necessary in order to fulfil the requirements of the law for the validity of the marriage, for the whole Chapter would count only as the Ordinarius (cfr. Gasparri, n. 1116 and note).

Authors are not agreed on the point whether Cardinals have the right to act as the Ordinary for marriages in their Titular Churches. Many hold that they possess this right: e. g. Ballerini: " Quoad Cardinales notum est, eos in suis titulis esse Ordinarios et jurisdictionem habere episcopalem, itemque in ecclesiis, quae ipsorum Titulis subjiciuntur. Possunt ergo in suis Titulis interesse matrimoniis, vel alii facultatem dare iisdem assistendi. Vid. Ferraris, Bibl. Canon. V. *Cardinales*, art. 3, nn. 12 et 20." (Ballerini-Palmieri, op. cit., n. 1212). Similarly Bucceroni, II, n. 1026. Of course if the antecedent were correct, there could be no doubt about the consequent; and in olden times it was the case that Cardinals possessed a quasi-episcopal jurisdiction over the clergy and people of their Titular Churches. But this was all changed by the Constitution *Romanus Pontifex* of Innocent XII, 17 Sept. 1692, § 9, which, while it reserved to the Cardinals all their honours, reduced their jurisdiction to what is called *jurisdictio domestica*, and transferred the quasi-episcopal jurisdiction to the Cardinal Vicar of Rome; so that their jurisdiction is now limited to matters of ecclesiastical discipline and the correction of morals in regard to those attached to the service of the Titular Church. Therefore they no longer have the right to assist at marriages as the Ordinary of the Titular Church, even though it be a parish-church. (It may be remarked, too, that many of the Cardinalitial Titular Churches have no ecclesiastical territory attached to them.) Father Wernz, S. J., n. 176, not. 177, writes: " Ex informatione accepta a competente auctoritate, Cardinales etiam in suis titulis, qui simul sunt ecclesiae parochiales, matri-

moniis illorum parochianorum non amplius jure proprio possunt assistere; praxis enim Romana est contraria, nec Cardinales potestatem parochi actualis retinuerunt." (Cfr. Gasparri, n. 1121; Pezzani, *Codex Sanctae Catholicae Romanae Ecclesiae*, p. II, v. 3, pag. 934). Cardinal Bishops, of course, have all episcopal rights in their suburban dioceses.

There is a similar dispute about the power of Apostolic Legates and Nuncios to assist at marriages in the countries or provinces to which they are accredited. Of course in the case of Legates sent on extraordinary missions and with extraordinary faculties, it will depend on the tenor of their faculties. The question only concerns the regular Nuncios, etc., appointed by the Holy See. Ballerini (op. et loc. cit.) affirms their right; also Noldin, n. 646, 1°; Bucceroni, loc. cit., etc., etc.; and Ballerini adduces several decisions of the S. C. of the Council in support of his view. Once again, however, it would seem that the solution of the question turns upon the difference between the modern and the ancient discipline. Gasparri, than whom none can be more competent in this matter, both as having himself held the office of Apostolic Delegate, and as now occupying the post of Secretary to the Sacred Congregation for Extraordinary Ecclesiastical Affairs, says (n. 1122): "Si Nuntio, etc., expresse datur potestas vel assistendi matrimoniis vel dispensandi in impedimento clandestinitatis, nulla est quaestio; sed de facto hujusmodi facultates dari non solent, et si darentur, essent delegatae, non ordinariae. Videamus igitur num Nuntius, etc., vi muneris, utpote Ordinarius in territorio, valeat, etiam sine expressa facultate, matrimoniis in territorio as-

sistere aut assistendi licentiam concedere. Nuntius apostolicus habet tum missionem diplomaticam apud Gubernium illius loci, tum missionem ecclesiasticam apud clerum et populum. In antiqua disciplina pro hac ecclesiastica missione magnas obtinebat facultates, quae erant ordinariae, quia ipsi muneri adnexae; sed hodie, vi muneris, habet jurisdictionem valde limitatam, praeter primatum honoris. Nam, si praescindamus a facultatibus eidem expresse delegatis, Nuntius, etc., vi muneris, potest ubique celebrare Missam et etiam agere pontificalia (cum licentia Ordinarii in ecclesia cathedrali), auctoritative dare consilia in materia ecclesiastica, et corripere (absque poenis) errantes, et, ni fallimur, nihil aliud; de cetero omnia Sedi Apostolicae refert ejusque stat mandatis. Cum haec aliqualis jurisdictio adnexa sit titulo, est ordinaria, ideoque Nuntius, etc., rigorose loquendo, inter Ordinarios adnumerari potest etiam in actuali disciplina (Revera Pius VI in responsione ad quatuor Metropolitanos Germaniae eorum potestatem vocat *stabilem et ordinariam* - author's note, loc. cit.); sed cum ejus ordinaria jurisdictio adeo sit limitata, non putamus ad matrimonia protendi posse; ipse est *Ordinarius-extraordinarius*. Sane *Delegatum Apostolicum* inter *Ordinarios* proprie dictos recensere, videtur contradictio in terminis; et tamen Delegatus Apostolicus hodie eodem prorsus modo mittitur ac Nuntius et Internuntius et unica differentia est in gradu hierarchiae."

While the Ordinary has the *right* to assist at any marriage celebrated within the territory subject to his jurisdiction, it is both the *right* and the *duty* of the *parochus* to solemnize the marriages which take place in his parish or district. For the *parochus*

has the immediate responsibility for the souls committed to his charge, and the personal direction of all the religious affairs of his cure. He has been placed these to discharge personally, as far as may be, the multifarious ministerial duties of the parochial office. Hence the right of assisting at the marriages contracted in a parish is one which in practice more nearly concerns the *parochus* than the Ordinary. The indiscriminate exercise of his right by the latter would be both an invasion of the right of the parish-priest, and, by causing confusion in so important a matter, a serious hindrance to the due performance of his parochial duties. The Ordinary, therefore, would not exercise his right to assist at marriages in the parishes of his diocese without special reason, and without notifying the fact to the parish-priest. The Secretary of the S. Congregation of the Council in the *Schema* of the Decree which he presented; thus expresses what I have said: " Quamvis vero Episcopi aliique locorum Ordinarii possint et valide et licite matrimoniis adsistere, cavere tamen debent ne crebrius id faciant; numquam autem inconsultis parochis nupturientium propriis " (canon 7; Acta S. Sedis, vol. 40, p. 565): and, while the Cardinals of the S. Congregation did not consider any formal legislation on this point necessary, the proposed canon accurately represents the views of canonists and theologians. (Cfr. infra, p. 79 on Delegation by the Ordinary).

§ 3.

The Delegate.

By the law both of the Council of Trent and of Pius X, the faculty is given to the *parochus* and to the Ordinary to appoint or to give permission to another priest to represent them as the *testis auctoritativus* of a marriage. The priest who is thus authorized to assist at a marriage is called the *Delegate*. There is a special clause (no. VI) in the new decree, which treats of the delegate, his powers and his limitations; and as he is bound by the rules that are laid down for the *parochus* and the Ordinary in clauses IV and V, it is not possible at the present juncture to deal exhaustively with the whole subject of delegation, and I must confine myself more or less to general conditions and regulations.

I. Conditions requisite for the validity of delegation.

The fundamental and necessary condition is that the delegate be a priest. "Quia exigitur testimonium fide dignum, ideo requisivit Concilium in assistente matrimonio dignitatem parochialem, ut tanto magis fides ei adhibeatur: quae dignitas cum deficiat in non parocho, voluit eam suppleri per dignitatem sacerdotalem in substituto." (Pirhing, lib. IV, tit. III, n. 17: ap. Gasparri, n. 1129). The only case in which a marriage would be valid it celebrated before a delegate who was not a priest, would be when a person who was publicly though

erroneously thought to be a priest, being in reality only a deacon, or a cleric, or even a layman, assisted at a marriage, having been delegated by the lawful authority for that purpose. In such a case, the Church, owing to the common error, would make good the defect.

Secondly, in order that the delegation be valid, it is necessary that it be received from one who himself has the right to assist validly at the marriage. This follows from the canonical principle already quoted: "Nemo potest plus juris transferre in alium, quam sibi competere dignoscatur." Hence as we shall see when treating of clause IV, a *parochus* or Ordinary cannot, according to the new law, delegate the faculty to assist at a marriage outside his own territory, even though it be the marriage of his own subjects.

On the other hand, the *parochus* validly delegates within his own territory even in spite of the prohibition of the Bishop or of a synodal decree, for he has received his power of delegation from the supreme ecclesiastical authority, that, namely, of a General Council and of the Holy See, and therefore it cannot be taken away from him by a subordinate authority. The episcopal or synodal prohibition, however, may render his delegation illicit. But the prohibition of the Supreme Pontiff would make the delegation invalid, if it were issued with an invalidating clause; if not, it would be illicit, but not invalid. It must be remembered that the term *parochus* includes all those persons who have full powers for the discharge of all parochial functions; so that a Coadjutor who has been appointed with the plenitude of the parochial ministry,

being a *parochus* within the meaning of the law, has the power to delegate for marriages; and it is to be noted that this is not *subdelegation* (See Gasparri, n. 1086; Ballerini, n. 1218).

Thirdly, the delegation must be made by the *parochus* or the Ordinary, *sciente et volente*. If the delegation be obtained by giving false names of the contracting parties or of one of them, the delegation, and consequently the marriage, are invalid. Again, a false reason may be alleged in order to obtain the delegation, e. g. extreme necessity. In such a case the validity of the delegation would depend upon whether the concession was made subject to the express condition of the truth of the reason alleged—" si vera sunt exposita." —(Gasparri, n. 1127).

Fourthly, as regards the delegation itself, it must be real, and antecedent to the marriage. A priest has no right to act upon the presumption that the parish-priest would consent to his assisting at a particular marriage. If he acted on such presumed delegation, the marriage would be invalid, even though the parish-priest were afterwards to ratify his action. It is therefore necessary that delegation should precede the marriage.

The law however, does not require any special formalities in the granting of this delegation. It may be given in writing, or orally, or even by means of the telephone or telegraph (1). It is ordinarily expedient, however, to give the delegation in

---

(1) Monsignor Sili in his *Votum* proposed that it should be made a condition of validity of delegation that it be granted in writing. " Ex vigenti disciplina, valida est

writing, so as to prevent any future difficulties that might arise, if the fact of the delegation were afterwards disputed. For this reason, the Bishop of a diocese may, either in or out of synod, regulate the concession of delegation and prohibit certain informal methods of granting it. Such prohibition does not render delegation granted in those ways invalid, but makes it illicit.

Even *tacit* delegation is valid, though no doubt it is very dangerous in practice. Delegation is understood to be tacitly granted when the *parochus* or Ordinary is aware that another priest is about to assist at a marriage within his jurisdiction (i. e. the jurisdiction of the *parochus* or Ordinary), and raises no objection to this proceeding when he might easily do so. His silence is in this case equivalent to acquiescence and consent, according to the canonical principle: " Qui tacet consentire videtur. "

---

licentia a parocho vel Ordinario data, viva voce, alii sacerdoti ad assistendum matrimonio: quin etiam valet sub certis conditionibus licentia tacita, nec desunt qui disputent de valore licentiæ præsumptæ et interpretativæ. Jamvero nonne ista minus conveniunt dignitati et gravitati matrimonii, nedum qua sacramentum est sed etiam qua contractus, ex quo tum conjugum et prolis tum utriusque societatis bonum quam maxime pendet? Pleræque delegationes ad acta civilia, etiam parvi momenti, invalidæ sunt nisi in scriptis fiant, certæ personæ et quidem ope publici tabellionis. Jam quis putet plus æquo requiri, si dicamus ad validitatem dictæ licentiæ opus esse ut scripto detur determinato sacerdoti? Quæ tenuis juris vigentis modificatio, dum præstat ut honor debitus etiam ex hoc capite habeatur sacramento, quod *magnum est,* præterea supprimit quæstiones circa valorem licentiæ tacitæ vel expressæ vel interpretativæ, quæ haud raro ipsius matri-

This tacit delegation must be carefully distinguished from the presumption of delegation, referred to above, which is invalid. The difference is that in the presumption of delegation, the ratification of the act of assisting at the marriage is looked for in the future, after the marriage is over; and then it is too late; but in tacit delegation the act is already ratified by the tacit acquiescence of the *parochus* or the Ordinary. As I have already said, however, it is dangerous to act upon tacit delegation, and Gasparri's rule is probably the best in practice, namely, in the case of a marriage about to be celebrated do not act upon tacit delegation or consider it sufficient; if the marriage has already been celebrated, it is to be considered valid (Gasparri, n. 1134).

Express delegation. whether written or oral, is of three kinds: 1° *delegatio specialissima*, when it is

---

monii valorem in discrimen adducunt" (Acta S. Sedis, vol. 40, pp. 538-9).

This suggestion was embodied in the *Schema* discussed on the 14th of July, 1906, thus: "Canon 4. Licentia assistendi matrimonio a parocho vel Ordinario valide concedi nequit, nisi in scriptis, determinato sacerdoti, etc." (Acta S. Sedis, loc. cit., p. 569).

Some Consultors, on this canon, thought "delegationem valide concedi posse etiam viva voce, et sufficere ut de illa fiat mentio in libro parochiali; hinc dicerent: 'De licentia assistendi matrimonio... constare debet in scriptis'; vel 'Licentia assistendi... nequit nisi... directe oretenus præsenti vel aliter in scriptis'; vel saltem eo sensu ut possent parochi etiam oretenus concedere licentiam assistendi matrimonio propriis viceparochis seu coadjutoribus ordinariis in casibus saltem urgentioribus" (ibid, not. 3).

Both proposals, however, were excluded from the *Schema*

given to a particular priest for a particular marriage; 2° *specialis*, when delegation is given to a particular priest to assist at all marriages in a certain parish or diocese; 3° *generalis*, which is of two kinds: *a*) when a particular priest is delegated to perform all parochial functions, to discharge all the ministerial duties that belong to the cure of souls, or in some equivalent formula: *b*) when the permission to assist at one or more marriages is given not to a definitely indicated priest, but indeterminately to any priest or to a number of priests.

There is something to be said about each one of these forms of delegation. With regard to the first, *specialissima*, the essential conditions of the delegation must be strictly observed. The delegation may not be transferred to another priest, unless the power of subdelegating is also granted, and it may not be used for any but the two parties

---

considered in the session of the 26th of January, 1907: "Can. 8. Ordinarius et parochus... licentiam concedere possunt adsistendi matrimonio alii determinato sacerdoti, etc." (ibid, p. 573): so that the existing discipline remains unchanged.

With regard to the suggestion that the fact of delegation should be mentioned in the matrimonial register, though the S. Congregation has not imposed it as a condition of validity (and it is difficult to see how it could do so, as the validity of the marriage would thereby be suspended until it had been duly registered: the Consultor probably had no intention of suggesting a condition, but a precept, which would make the omission illicit), yet there is no doubt that this should always be done; and it might very fittingly be made the subject of one of the instructions addressed by the Ordinary to his clergy, alluded to in art. IX, § 1, of the Decree.

mentioned in the delegation. Some years back, the parish-priest of S. Sebastiano, at the request of Joseph F. and Mary G., granted a written delegation to the parish-priest of S. Andrea to assist at the marriage of the two petitioners. But Mary G. appeared before the parish-priest of S. Andrea with George M., and was married to him in virtue of the above delegation. The Holy Office, declared this marriage invalid, 2nd August 1899. For "Potestas delegata stricte est intelligenda, nec extenditur ad res et casus in delegatione non specificatos" (Riganti, De Reg. Cancell. Rom. tom. I, p. 293, n. 225): "Jurisdictio delegata nunquam extenditur ad personas in rescripto non nominatas" (ibid. p. 108, n. 7). Similarly the S. C. of the Council, as long ago as 1666, declared invalid the marriage celebrated by a delegated priest between Giuseppe Clerici and Domenica Cavaleri when the delegation was granted for the marriage of Giuseppe Savardi and Domenica Cavaleri. In another case the surname of the bridegroom was altered in the document of delegation. The marriage was therefore declared null (9 Feb. 1669).

As regards *special* delegation, the faculty to administer all sacraments which do not require episcopal power, does not necessarily include the faculty of assisting at all marriages, for to assist at a marriage is not to administer the Sacrament of Matrimony. The Holy Office, asked "An facultati generali administrandi omnia sacramenta quae ordinem episcopalem non requirunt, includatur facultas assistendi omnibus matrimoniis fidelium dioeceseos?", replied: "Negative, nisi agatur de vice-parochis,

qui ex consuetudine dioecesis habitualiter delegati censeantur pro propria parochia" (7 Sept. 1898) (1).

General Delegation. *a*) General delegation by which the plenitude of the parochial ministry is granted to a priest, e. g. a coadjutor, makes him, as we have already seen, a *parochus* within the meaning of the marriage law, so that he assists at marriage *jure proprio* and not by delegation, in the sense in which we are now using that term.

b) Delegation in which the person of the priest delegated is not clearly determined, will henceforward, according to clause VI of the new decree, be invalid. Further observations, therefore, on such general or indeterminate delegations must be reserved till we reach the discussion of that clause.

The fact of the delegation must be known to the priest delegated, otherwise his presence at the marriage will be invalid (S. C. C., 16 April, 1625); and it ought to be officially intimated to him.

Finally delegation may be revoked either by him who has granted it or by his successor. But the revocation takes effect only when it has been officially intimated to the delegated priest. Hence he would validly assist at a marriage if he had not yet heard of the withdrawal of the delegation, or if he had heard of it only indirectly, through a third person. Many are also of opinion that the revocation must be known also to the contracting parties, and they seem to have the authority of a decision of the S. C. C. 27 June, 1733 (see Gasparri, n. 1152).

Delegation does not cease or become null and

---

(1) Cfr. De Becker, p. 105, not. 3.

void by the death of the delegator, or if he vacates his office. For delegation is a *gratia facta*, and accordingly the canonical principle may be applied: "gratia facta non expirat morte concedentis." But, "ad vitanda dubia et incommoda expedit," says Gasparri, n. 1153, "ut, ad cautelam, hujus licentiae confirmatio a successore delegantis petatur et obtineatur, nisi statuto generali his casibus provisum jam sit."

Subdelegation. — The *parochus* and the Ordinary may give to the delegate the faculty of subdelegating the power to assist at the celebration of marriage. If this special faculty is not given, then the delegate who has received delegation for one particular marriage cannot subdelegate, unless his delegation comes from the Pope. If he is delegated in the second way, that is, by *special* delegation, to assist at all marriages in a particular parish, it is doubtful whether he can subdelegate, and he ought not to do so: but if he has faculties to deal with all matrimonial matters, *ad omnia negotia matrimonialia*, like the first *vicaires* in the diocese of Paris, and *a fortiori*, if he is appointed to discharge all parochial functions, he can certainly subdelegate, if it can be correctly so called, for it is rather direct delegation, since such a priest is a *parochus* within the meaning of the matrimonial law (Cf. Gasparri, n. 1132).

II. Conditions necessary for the lawfulness of delegation.

A distinction must be made between delegation by the *parochus*, and delegation by the Ordinary.

Delegation by the Parochus. — "Ante omnia parochus non ita ad sui libitum putare debet sibi

licitum, deputare alium sacerdotem. Profecto Benedictus XIV, Const, *Nimiam licentiam* 18. Maii, 1743, § 9, (Bullar. tom. I. Const. 85.) sic habet: ' Ac primum omnium, munus, quod ad proprium parochum jure spectat, interessendi matrimoniis celebrandis, per se ipse parochus, nisi legitima gravissimaque de causa impeditus, obire tenetur. ' Non tamen videtur hoc consuetudine receptum, et levior causa, v. gr. quod assistat Sacerdos sponsorum consanguineus, ex usu sufficit " (Ballerini-Palmieri, n. 1228).

Similarly Noldin (op. cit. n. 648, Nota, and not. 6): " Etsi parochus sine justa causa alium sacerdotem sibi substituere non debeat, quia juri parochiali sine causa cedendum non est; necesse tamen non est, ut causa sit gravissima vel gravis, sed sufficit ut sit rationabilis; sic ex usu nunc recepto parochus ex quavis rationabili causa licentiam assistendi alteri sacerdoti concedit. Benedictus XIV. Constit. *Nimiam licentiam* 18 Maii, 1743, legitimam gravissimamque causam postulat; verum hoc statutum in praxim deductum non est. "

The principal condition therefore for the lawfulness of delegation by the parish-priest is that there be reasonable cause, of which Ballerini, in the passage quoted above, gives a good example.

The *parochus* is also bound to observe the diocesan regulations and statutes, and any episcopal precepts he may have received concerning delegation.

Moreover, since a dispute as to the validity of a marriage might turn upon the point of the validity of the delegation, it is the duty of the parish-priest to take care that sufficient proof of the validity of

the delegation exists. This will be best secured by entry in the marriage register.

Delegation by the Ordinary. — What has been said above (p. 68) about the personal assistance of the Ordinary at marriages, is equally applicable to delegation by him. Benedict XIV (constit. cit., § 12) says: " Antistites..... diligentissime cavent ne ad libitum hac sua auctoritate..... cuilibet potius Sacerdoti quam proprio Parocho facultatem ut in contrahendis Matrimoniis interesse possit, committendi, nisi ubi ineluctabilem necessitatem ita exigere animadvertent, utantur." De Becker, however, says that these very strong words are not to be understood too literally — " non sunt nimis urgenda modo generali "; but still he requires that the Ordinary's reason for delegating another priest to perform a marriage shall be graver and stronger that that of the parish-priest: — " Ad liceitatem quod attinet, requiritur causa *relative gravis* pro episcopo, et causa *justa* pro parocho " (De Becker, op. cit., p. 102. Italics mine). The reason of this is clear, for the Bishop's delegate would be performing a function which was within the right and among the ordinary duties of the parish-priest.

Hence Gasparri (n. 1125) says: " Ordinarius quoad liceitatem cavere debet ne his licentiis confusionem ingerat in re tam gravi, ac ordinaria parochorum jura nimis lædat; requiritur igitur causa rationabilis. " Lehmkuhl too, after stating that the Ordinary has the right of delegation, remarks: " Quamquam sine gravi causa id fieri non debet, ut Superiores a parocho ad se hoc negotium advocent. " (Op. cit., n. 775 ad III).

***

Since it is now necessary for the validity of *Sponsalia* that they be celebrated with due solemnity, namely in the presence of the parish-priest or the Ordinary or two witnesses, it may have occurred to some of my reverend readers to ask whether the *parochus* and the Ordinary have not the power to delegate another priest to represent them at *Sponsalia* as they have for marriage itself. For the greater power would seem to involve the less: and the principle of the Canon Law: "Cui licet quod est plus, licet utique quod est minus" (reg. 53 juris in 6), appears to fit the present case exactly, especially as *Sponsalia* are, according to St Thomas, the sacramentals of the Sacrament of Matrimony: "Sponsalia sunt quaedam sacramentalia matrimonii, sicut exorcismus baptismi" (IV. Sent. D. 27, q. 2, a. 1, ad 6).

On the other hand, there is not the same necessity for the power of delegation for *Sponsalia* as there is for marriage; for in the latter case, the presence of the Church's official witness is a condition *sine qua non* for validity, and the reason why delegation is permitted is that the condition may be made more easy of fulfilment, on the principle *qui facit per alium facit per se*. But the same reason does not hold good in *Sponsalia*; for the presence of the *testis auctoritativus* is not absolutely necessary for their validity. If he signs the document, that alone is sufficient; but in his absence any two witnesses will suffice; so that if the *parochus* or the Ordinary be not present, his place must

be taken by *two* witnesses, even though one of them be a priest.

And this seems to be the intention of the legislator, which is made sufficiently explicit in the wording of the decree: for while delegation is expressly permitted in the case of marriage, the only alternative allowed for the presence of the *testis auctoritativus* at *Sponsalia* is that of two witnesses. The case is governed by the canon of interpretation which says: "Legislator quod voluit expressit, quod noluit tacuit" (Ex cap. 12, de Decim.).

Of course this view is put forward with all due submission and without any pretence to authority; but it has been confirmed for us by that eminent Roman canonist and member of the Commission for the Codification of the Canon Law, Mgr Sebastianelli.

§ 4.

The Witnesses.

Both the Council of Trent and the Decree of Pius X make it a condition necessary for the validity of marriage that it take place in the presence of two witnesses in addition to the parish-priest, who is the *testis auctorizabilis* or *qualificatus*. Neither law, however, requires any special qualities or qualifications in these two witnesses over and above those natural attributes which go to make the capacity of adverting to what is being done and of bearing testimony to it, such as, the use of reason and of the senses, etc. Hence men, women, chil-

dren who have the use of reason, relatives, the clergy secular and regular, nuns, infidels, heretics, the excommunicate, persons of ill fame, etc., may all validly act as witnesses to marriage, though of course there are many whom it would be unbecoming, and unlawful without grave reason, to use in this capacity. Hence in many places local statutes exist regulating the selection of matrimonial witnesses. These laws, however, affect only the lawfulness, not the validity of the marriage. Similarly, the Holy Office, 19 Aug. 1891, when asked if it was permitted to make use of heretics as witnesses to Catholic marriages, replied: "Non esse adhibendos; posse tamen ab Ordinario tolerari ex gravi causa, dummodo non adsit scandalum."

One of the Consultors of the Sacred Congregation of the Council, in the *votum* which he wrote for the framing of the new law, made the suggestion that for the future only adult males should be admitted as witnesses for the licit celebration of marriage. "Adderem quoque: *testibus qui quantum pertingit ad honestatem actus sint quoad ejus fieri potest mares et puberes.* Notum quippe est secundum hodiernam disciplinam posse admitti quosvis testes dummodo per se, seu de jure naturae, idoneos ad faciendam fidem, et hinc pueros, mulieres, infames, etc. Abstinerem tamen a termino: *et ceteroquin de jure habiles.* Nam tum requirerentur certae qualitates, quae in praxi facessere possunt difficultatem." (*Acta S. Sedis*, vol. 40, p. 546, not. 1). This suggestion, however, was not accepted by the S. Congregation, and no change has been made in the law on this point.

From what was said above it follows also that

the merely *physical* or *material* presence of the witnesses does not suffice for the validity of the marriage. An *intellectual* or *moral* presence is also necessary; that is they must be present *humano modo*, as theologians say, so that they perceive that a marriage is taking place between two persons and that the mutual consent of the contracting parties is given to the marriage, and their knowledge of this must be sure, so that they can afterwards testify with certainty to the fact of the marriage. Hence a person who is intoxicated (so far as not to know what he is doing), asleep, unconscious or otherwise without the use of his senses, cannot be a valid witness to matrimony. "Juxta textum in *l. Coram Titio 209 ff. De verb. signif.*, cujus verba sunt haec: *Coram Titio aliquid facere jussus, non videtur praesente eo fecisse, nisi is intelligat. Itaque si furiosus, aut infans sit, aut dormiat, non videtur coram fecisse.* Cui conformis est *Can. Testes, 3, q. 9*, ubi glossa, *in verb. Praesentia*, inquit: *Dum tamen intelligant; nam aliter non dicuntur praesentes;* et Can. *In primis 2, q. 1*, ubi eadem glossa, *verb. Praesente*, subdit: *Et intelligente, alias non diceretur praesens*" (Bened. XIV, *De Synod. Dioeces.*, l. 13, c. 23, n. 6). The loss of one sense, however, does not render him incapable of witnessing marriage. If he is deaf, he can make sure of the fact of the marriage from the signs and actions that take place during the ceremony and which signify the mutual consent of the bridegroom and bride: if blind, his hearing will serve him, if he can recognize the voices of the contracting parties and there is no danger of deception; so that his testimony would in such a case be accepted (see Gasparri, op. cit.,

n. 1161 and authorities there cited). But it is not necessary that the witnesses should be personally acquainted with the persons who are being married. It is sufficient that they should be able to identify them again. "Satis est," says D'Annibale, vol. III, n. 461, "ut eos (quasi qui pertranseuntes viderint aliquem, v. c., furantem, vel occidentem) recognoscere possint." A person who is both blind and deaf cannot be a valid witness of a marriage (Gasparri, n. 1161).

Another condition requisite for the validity of marriage is that the witnesses shall all be present together, for all have to testify to the same act. It would not be a valid marriage if the contract were repeated first before one and then before another. There must be the one mutual consent witnessed by the parish-priest or his delegate and two other persons simultaneously.

There is still another requirement as regards the witnesses; but it is one that we must approach cautiously, for it is closely connected with a change which the new decree makes in the Tridentine law. It is necessary that the assistance of the witnesses at a marriage be *formal*, that is, they must be there *as witnesses, formaliter qua tales* (the Latin is much more expressive than the English). I have said that this condition is closely connected with a change which has now been introduced into the marriage law, but still the one must be clearly distinguished from the other. According to the new decree, the parish-priest must, for the validity of the Sacrament, be previously invited and requested to act; he may not be used as a witness against his will; his presence must not be due to violence or to the in-

fluence of grave fear (see Decree, clause IV, § 3). This point must be discussed later in its proper place, and at the same time we shall have to consider whether these provisions of the law are to be extended also to the other two witnesses. But when theologians or canonists speak of the *formal* presence or assistance of the witnesses, they do not mean quite the same as this. A witness may be present *formaliter qua talis* without any invitation or request to assist at the marriage; he may be brought to it by violence, inveigled by fraud, without knowing what is going to take place, and yet be a witness in the *formal* sense of the word. All that is required in order that he be a *formal* witness is that the contracting parties intentionally make use of his services as a witness to their marriage, even though he himself be not aware of their intention to use him in that capacity (I am speaking now of the two simple witnesses, not of the priest, the *testis qualificatus*). It is a matter that depends on the intention of the contracting parties, not on that of the witness himself. They must wish and intend him to be a witness of the marriage, but they need not express their desire in explicit terms. The implicit intention to use him as a witness is sufficient to make him a *formal* witness, and he receives sufficient intimation of that intention from the fact that the ceremony is performed in his presence. Thus the S. Congregation of Propaganda, 2 July 1827, decided that a marriage was valid which was celebrated in the presence of a number of persons assembled for the occasion, though none were specially designated as witnesses, for, says Gasparri, "cum matrimonium

coram pluribus celebratur, omnes uti testes implicite adhibentur" (n. 1163). Similarly, if only one of the appointed witnesses were present at the ceremony, and a person who had entered the church through private devotion and was kneeling quite apart, saw and heard all that took place, that person would be a *formal* witness of the marriage: — "Si expressioni consensus unus tantum formalis testis aderat, sed devota mulier in extremitate ecclesiae omnia vidit et audivit: sponsi enim matrimonium publice in Ecclesia ineuntes, omnes qui in Ecclesia sunt, testes velle videntur; licet parochus cautius agat, si, absentiam testis advertens, alium formalem testem substituat" (ibid.). This will sufficiently explain what theologians and canonists mean when they say that it is necessary for the validity of marriage that the parish-priest and the witnesses be *formaliter ad hoc adhibiti.* Hitherto this has sufficed for the validity, even though the presence of the parish-priest or witnesses was unwilling, and due to force, fraud or fear. But it is certain that for the future something more will be required on the part of the parish-priest, for, as mentioned above, the new Decree contains a clause which requires that he shall be an invited and willing witness. Nothing is said about the other two witnesses in connection with this condition; but we shall have to consider under clause IV, § 3, whether they also must, for the validity of the contract, be present voluntarily and by invitation.

CHAPTER II.

Conditions for the Validity of Marriage.

"IV. — Parochus et loci Ordinarius valide matrimonio adsistunt,

"§ 1. a die tantummodo adeptæ possessionis beneficii vel initi officii, nisi publico decreto nominatim fuerint excommunicati vel ab officio suspensi;

"§ 2. intra limites dumtaxat sui territorii: in quo matrimoniis nedum suorum subditorum, sed etiam non subditorum valide adsistunt;

"§ 3. dummodo invitati ac rogati. et neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum."

Having laid down the general principles according to which the marriages of the faithful are to be solemnized, the Holy See now proceeds to state what is required on the part of the parish-priest or the Ordinary, in order to make his assistance at a marriage, and consequently the marriage itself, valid. It is, of course, very necessary to distinguish clearly between the conditions which the Church requires to be fulfilled for the *validity* of the marriage, and those which have reference only to the *lawfulness* of the ceremony: and it is especially necessary in the present case to keep these two things distinct in our minds, for what has been hitherto one of the most important requisites for the validity of matrimony in the case of those bound by the decree *Tametsi,* namely, the possess-

ion of domicile or quasi-domicile, will in future affect only the lawfulness of the contract. In this clause, then, we have the conditions required for the validity, in clause V those laid down for the lawfulness of the assistance of the parish-priest or Ordinary.

§ 1.

This first section contains two conditions: 1. The parish-priest or the Ordinary cannot validly assist at the celebration of marriage, unless he has received possession of his benefice or has entered upon his office; 2. he cannot assist, if he has been by a public decree and by name excommunicated or suspended from his office. The first condition settles a point that has been disputed in the past; the second is altogether new.

I. With regard to the first, Gasparri says of the parish-priest: "Valet matrimonium, etsi hic parochus nominatus nondum missus sit in parochiæ possessionem, nisi ejus prædecessor possessionem adhuc retineat et nisi ex peculiari statuto vel consuetudine collatio tituli valeat tantum a momento traditionis possessionis; attamen assistentia ante traditam possessionem licita non foret" (op. cit., n. 1076); and of the Ordinary the same author writes: "Feije, n. 293, putat Episcopum non posse assistere antequam litteras Apostolicas Capitulo ostenderit, quia antea quicumque administrationis actus eidem prohibetur; quod non videtur verum, quia ex una parte episcopus jam est illius diœcesis episcopus, et ex alia, assistens matrimonio nec juris-

dictionis nec administrationis actum exercet. Sane Vicarius Generalis suspensus assistere potest, quia retinet officium, licet illud exercere nequeat; atqui etiam episcopus in casu habet officium, quod tamen exercere nequit, nisi litteris apostolicis Capitulo ostensis" (ibid., n. 1119). It is necessary, therefore, to distinguish between appointment or nomination to a benefice or office and its possession or exercise. According to the new law, the parish-priest and the Ordinary do not acquire the right to assist validly at the celebration of marriage by nomination or appointment, but only by actual possession of the office to which they have been appointed. This, in the case of a Bishop newly appointed to a diocese, will be when he has exhibited to the Chapter the Apostolic letters of nomination.

II. In the last chapter (art. V) I said: "Though the presence of the parish-priest is not an act of jurisdiction, still the Church requires that her official witness to the marriage shall be qualified by the possession of spiritual jurisdiction, or at least of the office to which spiritual jurisdiction over the contracting parties is attached" (cfr. Gasparri, n. 1044). For according to the actually existing discipline of the Church, once a parish-priest or Ordinary has entered upon his office, and as long as he retains it (for, of course, if he vacates his office by resignation, deposition, etc., he loses all such rights as this), he can validly assist at the celebration of marriage, even though he has incurred the severest censures of the Church. "Valide assistit parochus irregularis, notorie fornicarius, vitandus, tum suspensus etiam ab officio et beneficio, uti

censuit eadem S. Congregatio (Concilii) apud eumdem auctorem (Giraldi, *p. II, sect. 115, n. 23*), tum excommunicatus, ut edixit eadem S. C. apud Fagn. in *cap. I, De Matr. contract. cont. int. Ecclesiæ;* ac proinde a fortiori suspensus et excommunicatus non vitandus. Nam his censuris, parochus privatur quidem jurisdictione, sed permanet in officio suo; quod satis est pro conjugii validitate, cum assistentia non sit actus jurisdictionis" (Gasparri, n. 1097).

But the new law here introduces a change, and invalidates the assistance of a parish-priest or Ordinary who is either excommunicated or suspended by public decree and *nominatim*. (It is clear both from the construction of the Latin text and from the nature of the censures, that the words of the decree *publico decreto nominatim* must be read with *suspensi* as well as *excommunicati*). Those who are excommunicated *publico decreto* and *nominatim* incur the major excommunication and are *excommunicati vitandi* (1). "Vitandi sunt 1° qui nominatim, expresse et publice tamquam excommunicati, a judice competente denuntiantur, vel, ubi agitur de excommunicatione latæ sententiæ, qui eam attraxisse, sententia pariter judiciali et publica, declarantur" (Génicot, II, n. 581: cfr. Bucceroni, II, n. 1108). One of the effects of this excommunication is deprivation of all ecclesiastical jurisdiction, so that the acts of one who has incurred this censure are invalid (cfr. Ballerini-Palmieri, VII, n. 409).

---

(1) "Si... nominatim et publice denuntiatus suspensus ab officio, aut excommunicatus, ideoque vitandus" (Scavini, III, n. 882).

Similarly a cleric who is suspended by public decree and *nominatim* is *vitandus* (ibid., VII, nn. 493 and 508), and loses all jurisdiction. "Suspensus non toleratus invalide absolvit... etsi enim ordinem retineat sacerdos, caret tamen jurisdictione" (ibid., n. 509).

Suspension is either total or partial. Total suspension (suspension *simpliciter et absolute*) includes suspension both *ab officio* and *a beneficio*. Partial suspension is either *ab officio* or *a beneficio*. Suspension *ab officio* is the deprivation of the exercise both of order and of jurisdiction. This again is subdivided into its component parts, suspension *ab ordine* only and suspension *a jurisdictione* only.

Since, then, the marriage decree explicitly names suspension *ab officio* as the disqualification from assisting at marriage, suspension *a beneficio*, or *ab ordine* only, would not deprive the parish-priest or Ordinary of this right. For the same reason, either total suspension (which, of course, includes suspension *ab officio*) or the full suspension *ab officio*, that is, *et ab ordine et a jurisdictione*, would render his assistance at matrimony invalid.

The only question is, Would suspension *a jurisdictione* merely also have this effect?

On the principle that *odiosa sunt restringenda*, that laws of this kind are to be interpreted in their strictest sense, it would seem that the answer should be in the negative. Nevertheless, there are good reasons for holding that suspension merely *a jurisdictione* would invalidate the assistance of the parish-priest or Ordinary at Matrimony.

For, in the first place, in the *Schema Canonum* submitted to the S. Congregation on the 14th of

July, 1906, canon 3 ran thus: — "Parochus vel Ordinarius... semper matrimonio valide assistunt... nisi publico decreto fuerint... nominatim excommunicati aut suspensi, etiamsi appellatio interposita fuerit." One of the Consultors criticised the last part of the canon as follows: — "... Melius esset servare jus hodiernum quod retinet matrimonium valere usque dum de facto perdurat qualitas parochi. Si vero introducenda esset conditio dirimens *suspensionis*, quum hæc multiplex sit, nempe *a simplici beneficio*, aut *a fructibus beneficii*, aut *a divinis*, aut *a jurisdictione*, decernendum oporteret heic agi de suspensione *a jurisdictione* seu *ab officio*." (Acta S. Sedis, vol. 40, p. 569). The Consultor therefore held that suspension *a jurisdictione* and suspension *ab officio* were in this case synonymous. Moreover, his suggestion that the words *ab officio* should be added, was evidently accepted by the S. Congregation; for we find that in the next *Schema*, which was discussed on the 26th of January, 1907, the wording of the phrase is, "nisi publico decreto nominatim fuerit excommunicatus vel ab officio suspensus" (ibid. p. 573), and thus it remains in the Decree in its final form, except that the plural is substituted for the singular.

Secondly, the reason why the Consultor identified suspension *a jurisdictione* and suspension *ab officio* I imagine to be this: that the offices of *parochus* and of the Ordinary are essentially offices of jurisdiction. "*Ordinarius*. — Hac voce in jure denotantur illi, qui potiuntur jurisdictione in utroque foro" (Ojetti, *Synopsis Rerum Moralium et Juris Pontificii*, s. v. *Ordinarius*): "Parochus est ille clericus qui curam animarum seu jurisdictionem ordi-

nariam et propriam, quamvis Episcopo subordinatam in populum alicujus territorii legitime circumscripti ratione stabili exercet... Ordinarie debet esse presbyter; eligi tamen potest in Parochum etiam clericus nondum sacerdos, qui tamen 25 annos attigerit... et ad sacerdotium intra annum promoveatur" (ibid. s. v. *Parochus*).

Moreover the Decree is dealing with a matter into which the question of Order cannot enter at all, viz., the assistance of the *parochus* and the Ordinary at the celebration of marriage. The validity and even the lawfulness of this assistance is quite independent of the Sacrament of Order. As we have already seen (chap. I, page 42), a *parochus* without Orders may validly and licitly assist at the celebration of marriage. But though the assistance of the *parochus* or Ordinary is not technically an act of jurisdiction, it has, in the jurisprudence of the Church, always been connected with his jurisdictional office (see chap. I, § 2, p. 61). The only question could be whether for the validity of his assistance at marriage it was sufficient to hold the office without possessing the jurisdiction of which it is exigent, or whether it was necessary to have the possession and valid exercise of that jurisdiction. Hitherto the Church has considered the former sufficient: now she declares the latter necessary. It may be remarked that if a *parochus* without Orders were suspended *ab officio*, he would, in effect, be suspended *a jurisdictione* only. Of course, if a *parochus* or Ordinary who was in sacred Orders, were suspended *ab officio*, this would include suspension both *ab ordine* and *a jurisdictione;* but on the other hand, it seems clear that suspension

simply *a jurisdictione* is sufficiently suspension *ab officio*, within the meaning of the marriage decree (1).

I have hinted above that it is the intention of the Church that the *parochus* or Ordinary shall no longer validly assist as the *testis qualificatus*, the Church's official witness, at the celebration of matrimony, unless he has not only possession of his office, but also the possession and valid exercise of his jurisdiction. This is shown by the fact that the censures which are now declared to invalidate his assistance at marriage, are precisely the only two censures which would have the effect of depriving him of his jurisdiction. Thus, " Excommunicatus vitandus privatur ne dum usu jurisdictionis, sed ipsa jurisdictione (Schmalzgr. n. 164) ideoque ejus actus sunt invalidi... Excommunicatus toleratus etiam notorius retinet jurisdictionem ideoque ejus actus per se valent; at illicite ea utitur, nisi eam exerceat ex gravi causa vel rogatus " (Ballerini-Palmieri, VII, n. 409): and with regard to suspension, " Suspensus non toleratus invalide absolvit,... etsi enim ordinem retineat sacerdos, caret tamen jurisdictione. At toleratus, propter fidelium utilitatem, non privatur jurisdictione " (ibid. n. 509). Finally interdict, the only other censure, does not take away jurisdiction at all: — " Res sacrae, a quarum participatione seu usu removet interdictum, sunt 1° divina officia: 2° quædam sacramenta: 3° sepultura ecclesiastica... Quæ his tribus non conti-

(1) The assistance of the *parochus* or Ordinary, requisite for the validity of matrimony, must be carefully distinguished from the ministerial act of blessing the marriage.

nentur, per interdictum non auferuntur: idcirco manet ex. gr. jurisdictio" (ibid. nn. 548-549). "Interdictum... nec adimit jurisdictionem; et hoc nomine ab utraque (excommunicatione et suspensione) distat" (D'Annibale, I, n. 370).

The Church, then, clearly intends that for the future the *testis qualificatus* of matrimony shall possess the jurisdiction which naturally belongs to his office of *parochus* or Ordinary. But suspension *a jurisdictione*, if it is by public decree and *nominatim*, deprives him of that jurisdiction. Therefore I conclude, both for this and for the other reasons given above, that suspension *a jurisdictione publico decreto et nominatim*, is, *salvo meliori judicio*, sufficient to invalidate the presence of the parish-priest or the Ordinary (1) at the solemnization of marriage.

There is a point which, though in no sense an argument and not used as such, may possibly serve to furnish some further explanation of the identification of suspension *ab officio* and suspension *a jurisdictione*. Some authors make the division of *Suspension* somewhat different from that which I have given above, which is the one commonly received, and, says Ojetti (op. cit., s. v. *Suspensio*),

---

(1) If the Bishop of a diocese incurs a censure that deprives him of his jurisdiction, his Vicar General is *ipso jure* suspended *a jurisdictione;* for the jurisdiction which he uses is identically that of the Bishop participated by him. Hence if the Bishop loses his jurisdiction, the Vicar-General's goes too (D'Annibale, I, n. 96). Consequently a Vicar-General, placed in such a position, could not validly assist at a marriage in the diocese, any more than the Bishop himself; nor could he delegate a substitute.

"magis juri est consona." Instead of dividing *Suspensio partialis* into *S. a beneficio* and *S. ab officio*, which latter is subdivided into *S. ab ordine* and *S. a jurisdictione*, they make a triple division of *S. partialis*, of which *S. ab ordine, S. ab officio* and *S. a beneficio* are coordinate members (e. g. Gury-Ballerini, II, n. 993; Génicot, II, n. 614). It is true that they explain *S. ab officio* to mean *S. both ab ordine and a jurisdictione;* but a logician would tell them that their division offends against that law of a good Division, which says that the members must be mutually exclusive. *S. a jurisdictione* is really the member that is complementary of and coordinate with *S. ab ordine;* and it is therefore not unnatural that *S. ab officio* should be taken as identical with it.

The rule has already been laid down (art. V) that "Nemo potest plus juris transferre in alium quam sibi competere dignoscatur." It follows from it that if a parish-priest or Ordinary has incurred either of the two censures which make his assistance at marriage invalid, he cannot validly delegate another priest to supply his place. Nor can a *parochus* or Ordinary do this before he has taken possession of his benefice or entered upon his office.

§ 2.

The second condition required for the valid assistance of the parish-priest or the Ordinary at the celebration of marriage is that it take place within the territory subject to his jurisdiction; i. e., in his parish or district, if the parish-priest assists, or, if the Ordinary is present, in his diocese. Outside his territory neither can validly assist, even at the marriage of his own subjects, unless he has received legitimate delegation; but within his jurisdiction there is no restriction or limitation to the validity of his assistance. Whether the persons to be married are his subjects or not, his presence at the marriage, either in person or by his delegate, is not only sufficient (provided that no diriment impediment exists), but even necessary for its validity.

Anyone who is at all acquainted with the actual discipline regulating the external form of marriage in those places where the Tridentine law is in force, will at once appreciate the immense importance of the change thus introduced. This section of the Decree is, indeed, after the clause which extends the law against clandestinity to the universal Church, the most important one in the whole Decree, and the most far-reaching in its effects. It marvellously simplifies the existing jurisprudence; in fact it involves its abolition in great part. It solves the very serious practical difficulties which are constantly being met with by Bishops, especially in great cities, as described by the Cardinal Archbishop of Paris and the Cardinal Bishop of Breslau, in their peti-

tions to the Sacred Congregation of the Council, and mentioned in the Preamble of the Decree as one of the motives for the alteration of the law. It removes the danger of marriages being contracted invalidly by reason of the absence of the *parochus proprius* of one or other of the contracting parties, and thereby more securely safeguards the integrity of the Sacrament, and obviates the necessity for the frequent sentences of nullity of marriage, which the ecclesiastical tribunals have been obliged to pronounce on the ground of clandestinity, to the great scandal of the faithful. Consequently, it relieves the ecclesiastical courts of much difficult, intricate and unpleasant labour. Other effects will appear in the course of this discussion, one of which will, I trust, be that by this section of the Decree the real discipline that the Council of Trent intended to establish is restored to the Church.

In view, then, of the great and fundamental importance of this modification of the existing matrimonial jurisprudence, I propose to enter into the subject in considerable detail.

I have stated at the head of this section the purport of the new legislation on this point. I must now, as carefully as I can, describe the actual discipline, in order that it may be clearly seen in what precisely the change consists. According to the canonical jurisprudence, then, that has grown up and come into operation since the Council of Trent, Christian marriage, in those localities where the decree *Tametsi* of the Council of Trent has been promulgated, is valid only when contracted in the presence of the *parochus proprius*, or the Ordinary, or the delegate of either, and at least two wit-

nesses. By the *parochus proprius* is meant the parish-priest who has jurisdiction over either or both of the contracting parties by reason of his, her, or their possession of a domicile or quasi-domicile in his parish. Similarly the Ordinary here is the Bishop (Vicar-General, etc.), in a parish of whose diocese one or both of the contracting parties have acquired a domicile or quasi-domicile. (It is necessary to omit, in this place, the special question regarding *vagi*). The *parochus proprius* and the *Ordinarius proprius*, according to the actual discipline, may both validly and licitly assist at the marriage of one of their subjects, either personally or by delegation, anywhere, even outside their own territory, and this without the consent of the parish-priest or Ordinary of the place where the marriage takes place. On the other hand, a parish-priest or Ordinary who has no jurisdiction over either of the persons who desire to be married, by reason of domicile or quasi-domicile, has no power to assist at their marriage without delegation from the *parochus* or *Ordinarius proprius*. If he did so, such marriage would be clandestine and invalid.

That this is the discipline actually in force in the Church at the present day (in those places, of course, where the decree *Tametsi* is published), there can be no dispute; but whether it is the discipline contemplated by the Council of Trent is quite another question. In fact there is an opinion which has been gradually gaining ground among canonists of late years, that the present jurisprudence is due rather to a restrictive interpretation of the Tridentine decree than to the real intention of the Council. This view has been urged more than once by ad-

vocates in the Tribunal of the S. Congregation of the Council, and has been presented to the same Congregation by two of its Consultors, first by Father Pius de Langogne in his *Votum* written upon the petitions of the Cardinals of Paris and Breslau, and since by Mgr Sili in the *Votum* which he wrote in preparation for the new marriage Decree. The other view, however, viz., that the actual discipline is that intended by Trent, is the common one, and was taken by Professor Lombardi, the other Consultor whose *Votum* was asked on the provisions of the new Decree, as well as by Father Wernz, now General of the Society of Jesus, in his *Votum* on a case of nullity of marriage on account of clandestinity at Paris in 1898.

This is obviously a question of great importance, and I therefore propose to give the arguments on both sides (1). [The *Vota* referred to above are to be found in the *Acta Sanctae Sedis*, vol. 40, p. 533, seqq. (Mgr. Sili); ibid., p. 541, seqq. (Prof. Lombardi); vol. 38, p. 244, seqq., p. 305, seqq., vol. 39, p. 245, seqq., p. 305, seqq. (Father Pius de Langogne); and vol. 32, p. 373, seqq. (Father Wernz).] It is not a merely speculative and otiose discus-

(1) It must not be understood that all the arguments here presented to prove that the Council of Trent did not intend to make the presence of the *parochus proprius* necessary for the validity of marriage, possess the high authority of the two eminent canonists mentioned in the text, Mgr Sili and Father Pius de Langogne: for instance, I am personally responsible for the historical argument drawn from the discussions of the Council as narrated in the history of Pallavicini, and for most of the replies to the arguments of the opposition.

sion. It will, I trust, have the practical effect of showing that the new Decree is not, in this particular point, a departure from the discipline of Trent, but rather a resuscitation of that Council's genuine idea and intention.

*
* *

The True Mind of the Council of Trent.

The decree of the Council of Trent, then, to quote it once more, is — "Qui aliter quam præsente parocho, vel alio sacerdote, de ipsius parochi, seu Ordinarii licentia, et duobus vel tribus testibus, matrimonium contrahere attentabunt; eos sancta Synodus ad sic contrahendum omnino inhabiles reddit: et hujusmodi contractus irritos et nullo esse decernit" (sess. 24, de Reform. Matrim. c. 1). Now, the whole question at issue is this, whether after the word *parocho* is to be understood the word *proprio* or not. The common view is that the Council certainly meant the *parochus proprius* and no other; and that consequently the present jurisprudence is in perfect accord with the mind of Trent (though, as we shall see, this does not necessarily follow). The other side holds that the Council did not intend to restrict the word *parochus* so as to mean only the *parochus proprius* of the contracting parties, but that it meant any *parochus* within his jurisdiction.

The main argument for the affirmative opinion

is drawn from the context of the decree. For both before and after the invalidating clause above quoted, the decree speaks of the *parochus contrahentium proprius*, and it is clear from the context that it is speaking of the same *parochus* throughout. Thus, "Sacri Lateranensis Concilii sub Innocentio III celebrati vestigiis inhærendo, præcipit, ut in posterum, antequam matrimonium contrahatur, ter a *proprio contrahentium parocho* tribus continuis diebus festivis in ecclesia... publice denuncietur, inter quos matrimonium sit contrahendum." And afterwards, "Eadem sancta Synodus... statuit benedictionem a *proprio parocho* fieri; neque a quoquam, nisi ab ipso parocho vel ab Ordinario licentiam ad prædictam benedictionem faciendam alii sacerdoti concedi posse.... Quod si quis parochus, vel alius sacerdos, sive regularis sive sæcularis sit,... alterius parochiæ sponsos sine illorum parochi licentia *matrimonio conjungere aut benedicere ausus fuerit*, ipso jure tamdiu suspensus maneat, quamdiu ab Ordinario ejus parochi, *qui matrimonio interesse debeat*, seu a quo benedictio suscipienda erat, absolvatur." In this passage, it is decreed that the *parochus proprius* should bless the marriage; that it is he "qui matrimonio interesse debebat"; and grave penalties are enacted against any other priest who should dare to join the parties in marriage or to bless them. Hence even if the Council of Trent does omit the word *proprius* in the annulling clause, that word is nevertheless necessarily implied, and is as a matter of fact explicitly inserted immediately afterwards, where the same idea is again expressed. This argument certainly appears to be very cogent, but still it is by no means invulnerable.

First of all, then, in the actual invalidating clause, the word 'proprius' does not occur: the *onus probandi* that it is to be understood falls therefore upon those who make that assertion; especially as this decree is a *lex correctoria*, and is therefore to be strictly interpreted. "Lex correctoria est stricte interpretanda et hujusmodi est decretum Tridentini, quod est correctorium juris antiqui... Ex quo juxta notoria principia infertur, quod ita interpretanda sit, ut quominus fieri possit, minus corrigat dictum jus commune" (Ursaya, Dis. 25, n. 26, tom. 7, par. 2: apud *Acta S. Sedis*, vol. 32, p. 364).

But further, there are grave reasons for believing that the Council omitted the word *proprius* from the invalidating clause intentionally and deliberately. Before proceeding however to give these reasons, it is necessary to refute the argument drawn from the context.

This is done by a very simple distinction. When the Council uses the term *parochus proprius*, it is speaking only of what is necessary for the *lawfulness* of the marriage; when it treats of what is necessary for the *validity*, it uses *parochus* only.

In the first place, no one will dispute the fact that the publication of the banns has absolutely nothing to do with the validity of the Sacrament of Matrimony, but only with its licit celebration; and it is quite clear why the publication is to be made by the *proprius contrahentium parochus*, as the object of the banns is to discover whether any impediment to the marriage exists; and so the publications must be made in the place or places where the parties who wish to be married are best

known, and where their home is, viz., in their own parish.

Secondly, the validity of the Sacrament is equally independent of the nuptial blessing. This third part of the decree contains only a prohibition and a precept. The giving of the nuptial blessing is the right of the *parochus proprius*, and if any other *parochus* or priest invades that right, he will be punished, for he has done what is unlawful and prohibited. And if it is the right of the *parochus proprius* to give the nuptial blessing, it is naturally his right too to perform the whole ceremony, as far as its *licit* celebration is concerned. Hence the Council does not say: "Si quis parochus vel alius sacerdos... alterius parochiæ sponsos sine illorum parochi licentia matrimonio conjungere ausus fuerit, *matrimonium sit invalidum*," but "*suspensus maneat.*" The marriage is not declared invalid, nor are the contracting parties ordered to present themselves before their *parochus proprius* for the validation of the marriage, but simply, the priest who has done wrong is punished.

The Council "vigilantibus verbis usum est," when in the invalidating clause it said: "contrahere *attentabunt*," while here it says: "conjungere *ausus fuerit;*" in the first case, it is an ineffectual attempt, the contract is null and void; in the second, the *parochus* who marries persons of another parish does a daring and a wrong action, but the marriage, the '*conjunctio*,' is accepted as an accomplished fact—"*conjungere ausus fuerit.*" Such a marriage then would be valid but illicit. Here then we have a positive argument that the Council in the invalidating clause did not intend to limit

the meaning of the term *parochus* to the *parochus proprius*, but rather the contrary (1).

There is a passage in the same session 24 of the Council, *cap. 13*, *de Reformatione*, which throws

---

(1) The clause of the decree *Tametsi:* "Si quis parochus... alterius parochiæ sponsos sine parochi illorum licentia *matrimonio conjungere* aut benedicere ausus fuerit, ipso jure tamdiu maneat suspensus, etc.," is used by both sides to prove their thesis. Thus Prof. Lombardi (loc. cit.) and the editor of the *Acta S. Sedis*, in a note appended to the *Votum* of Father Pius de Langogne (vol. 39, pp. 317-18), argue from it that only the *parochus proprius* can validly assist at marriage. Having quoted the passage from the decree, the Editor of the *Acta S. Sedis* thus comments: "Uti patet, unus idemque est parochus, nempe *proprius*, qui jus habet matrimonio assistendi et benedicendi." The writer therefore understands the word *conjungere* to refer to the presence of the *parochus proprius* in so far as it is necessary for the validity of the marriage, i. e. to his passive assistance. The same is true of the argument which I have transferred to the text from the *Votum* of Father Pius de Langogne; for there the words *contrahere* and *conjungere* are regarded as synonymous. I must confess, however, that in my opinion both sides quite miss the meaning of the word *conjungere*, as used in the Tridentine decree.

For, in the first place, *conjungere* is a very inappropriate word to express the part that the parish-priest takes in the making of the valid marriage contract, since he is merely a passive witness, while *conjungere* connotes a positive act. Hence *assistere*, in the sense of the Editor of the *Acta S. Sedis*, and *conjungere* may not be used as synonymous terms. Still less are *contrahere* and *conjungere* identical in signification; for *contrahere* can be used only of the contracting parties themselves, and is so used in the phrase of the decree "contrahere attentabunt." But *conjungere* denotes an act of the parish-priest, and so cannot have reference to the substance of the marriage contract,

light on the Council's intention respecting the rights of the *parochus proprius* and the licit celebration of Matrimony.

"In iis civitatibus ac locis ubi parochiales eccle-

---

which is an act of the contracting parties, not of the parish-priest.

Secondly, it seems quite obvious that the Council is alluding to a rite of the marriage ceremony, which, only a few sentences back in this same decree, it has made of precept, namely, to the solemn and public ratification of the contract already validly made, which he pronounces in the name of the Church by the formula: "Ego *conjungo* vos in matrimonium in nomine Patris, etc.;" "vel" as the Council says, "aliis utatur verbis, juxta receptum uniuscujusque provinciæ ritum." This is an act of authority and of benediction, and is accordingly reserved to the *parochus proprius:* "Si quis parochus... alterius parochiæ sponsos... conjungere aut benedicere ausus fuerit." But it is not necessary for the validity of marriage. It is part of the accidental solemnity, prescribed for the licit celebration of matrimony. Father Wernz, S. J. (*Ius Decretalium*, vol. 4, *Jus Matrimoniale*, n. 154) says: "Cum præterea celebratio matrimonii conjuncta esset cum sacrificio eucharistico, et sacerdos solemni ritu *conjungeret* sponsos;" to which he appends the following note (76): "Quæ conjunctio inde a medio ævo non rare expressa est solemni formula: *Ego conjungo vos in matrimonium*, etiam in Concilio Tridentino commemorata et in Rituali Romano retenta. Verba illa formulæ si nimis litteraliter intelligantur, ut recte animadvertit Duchesne, *Origines du culte chrétien*, p. 415, not 1, continent sensum excessivum et theologis quibusdam suppeditarunt argumentum, quo demonstrare conati sunt, sacerdotes, non conjuges, esse *ministros* sacramenti matrimonii. Quare mirum non est, quod aliæ diœceses retinuerint suas antiquas formulas pariter a Concilio Tridentino permissas, quæ doctrinam dogmaticam de veris ministris sacramenti matrimonii, i. e. conjugibus atque functionem liturgicam et auctoritativam sacerdotis

siæ certos non habent fines, nec earum rectores proprium populum, quem regant; sed promiscue petentibus sacramenta administrant; mandat sancta Synodus episcopis, pro tutiori animarum eis com-

---

clarius exprimunt." And n. 189: "Quamvis ad *valorem* contractus matrimonialis assistentia *passiva* parochi cum testibus *sufficiat*, tamen *etiam* in locis capiti *Tametsi* omnino non subjectis, ut *licite* fiant nuptiæ, jam ex antiquissima Ecclesiæ praxi, non vi juris Tridentini nondum alicubi vigentis, *activa* requiritur interventio parochi et *publica solemnisque* celebratio in facie *Ecclesiæ*...

"Quæ assistentia activa parochi, ut ipso cap. *Tametsi* (*conjungere aut benedicere*) et Rituali Romano l. c. aperte traditur, duobus actibus principalibus absolvitur scl. 1) sponsorum *conjunctione* sive *copulatione* atque 2) *solemni benedictione post* contractum matrimonium in *Missa* nuptiali data."

In n. 190, not. 277, he thus explains the rite, "Ego conjungo vos, etc.": "Quæ verba non sunt *forma* sacramenti matrimonii multoque minus enuntiant *sacerdotem* esse *causam efficientem* vinculi matrimonialis..., sed continent cæremoniam quamdam *accidentalem* ex præcepto Ecclesiæ saltem sub levi servandam..., qua parochus assistens 1) ut *testis auctorizabilis et minister ecclesiasticus* matrimonium *mutuo consensu* sponsorum *jam contractum nomine Ecclesiæ* publice et solemniter approbat ratumque esse *declarat*, et 2) ut *sacerdos* per adjunctam *benedictionem* sacerdotalem et invocationem divini numinis gratias cœlestes conjugibus apprecatur.

"Hinc dubium existere nequit, quin alia Ritualia diœcesana doctrinam catholicam mentemque Ecclesiæ de matrimonio clarius exprimant quam ipsum Rituale Romanum v. g. in diœcesi Monasteriensi; *Et ego matrimonium per vos contractum confirmo et ratifico in nomine Patris et Filii et Spiritus Sancti* et in diœcesi Augustana (Vindelic.): *Matrimonium inter vos contractum confirmet et ego illud approbo et in facie Ecclesiæ solemnizo in nomine sanctæ et individuæ Trinitatis Patris et Filii et Spiritus Sancti. Amen.*"

missarum salute, ut, distincto populo in certas propriasque parochias, unicuique suum perpetuum peculiaremque parochum assignent, qui eas cognoscere valeat, et *a quo solo licite sacramenta suscipiant.*" And though the priest is not, strictly speaking, the minister of the Sacrament of Matrimony, he is cer-

---

We may therefore take it as certain that when the decree *Tametsi* says "*conjungere aut benedicere ausus fuerit*," the word *conjungere* refers to the formula "*Ego conjungo vos in matrimonium*," and the word *benedicere* to the invocation of the Blessed Trinity, "*in nomine Patris*, etc.," and also, of course, to the subsequent nuptial blessing.

The argument of those who try to prove the necessity of the presence of the *parochus proprius* for the validity of the matrimonial contract, is thus deprived of all foundation. On the other hand the force and the efficacy of the argument in the contrary sense are greatly strengthened, and it becomes still more clear that the Council recognized marriages contracted in the presence of a *parochus non proprius* as valid. For while the Council inflicts a very severe punishment on any such parish-priest who dares to infringe the rights of the *parochus proprius* in the matter of the accidental ceremonial of marriage, no penalty is enjoined for the part he takes in what, if the view of the advocates of the *parochus proprius* were correct, would be an ineffectual attempt at marriage—for aiding and abetting what would therefore be a sacrilegious simulation of the sacrament: so that if he limits his cooperation to a mere passive presence at the exchange of consent, and refrains from pronouncing the ratification "*Ego conjungo vos*," and from blessing the marriage, he is not touched by the Council's censure. Surely wilful cooperation in the sacrilegious simulation of a sacrament is a much more serious offence than that of usurping the rights of another in the accidentals of the ceremony. The lesser fault is severely punished, the greater crime is allowed to pass without censure. Is not this because

tainly the minister of its sacred rites and ceremonies; and there is no doubt that the Council intended to include Matrimony among the Sacraments referred to in this decree.

Moreover, the Council, by its decree against clandestinity, was making a new law, and one which

---

the Council saw no simulation of the sacrament at all, but the real valid sacrament of matrimony in the contract made in the presence of a parish-priest, who though not the *parochus contrahentium proprius*, is in his own parish.

It is true that the decree *Tametsi* says immediately afterwards, referring to the *parochus proprius:* "*qui matrimonio interesse debebat*, seu a quo benedictio suscipienda erat." The words I have italicized undoubtedly refer to the presence of the *parochus proprius* at the substance of the contract, while *conjungere* does not: and they, rather than *conjungere*, should be made the basis of the argument to prove the necessity of the presence of the *parochus proprius*. This is done by Father Wernz (*Vot. cit.*, pp. 398-99): "Hinc præter determinatum parochum *reliqui* sub gravissimis *pœnis* excluduntur. At determinatus parochus, qui debet assistere sive interesse est *unus idemque* cum illo, a quo benedictio est suscipienda; sed in textu immediate præcedente Synodus Tridentina disertis verbis statuit: 'Benedictionem a proprio *Parocho* fieri.' Ob perfectam igitur æquiparationem inter Parochum *assistentem* et Parochum *benedicentem* ab ipso Concilio Tridentino stabilitam (qui *matrimonio interesse debebat* seu *a quo benedictio suscipienda erat*) etiam parochus assistens debet esse *proprius*." I have really no fault to find with this argument as it stands. It is all perfectly correct, and one is bound to accept the conclusion "etiam parochus assistens debet esse *proprius*." But the efficacy of the argument, for the purpose for which it is used, depends upon a false implication or supposition, viz, that the words *debebat*, *debet*, have reference to the *validity* of the marriage. Take away that implication, and the argument proves nothing

would have very important and far-reaching effects. Here, then, if anywhere, it was necessary for the Council to say exactly what it meant. When treating of matters concerning only the licit celebration of matrimony, viz., the publication of the banns and the nuptial blessing, it speaks plainly enough, and says explicitly that these are rights which belong to the *parochus proprius:* but when there is question of a change in the external form essential to the validity of matrimony and the introduction of a new diriment impediment, the Council, we are told, left one of the most important points, viz. the identity of the *parochus*, to be inferred! It is difficult to credit this, especially since it is a well-known fact that this was one of the most carefully

---

beyond what is conceded by all. As a matter of fact, these words refer only to the *licit* presence of the parish-priest. "Qui matrimonio interesse debebat" means "who should have been present, ought to have been present." Of course the *parochus proprius* should have been present; but there is no suggestion that his absence has invalidated the marriage.

The argument from the phrase "conjungere ausus fuerit" has therefore been put into the text for three reasons: 1. because it is the argument of Father Pius de Langogne in his *Votum*, and dates back at least to Sanchez, who urges it against his own doctrine, and certainly does not succeed in answering it (*De Matr.*, l. 3, disp. 19, n. 1 and n. 5); 2. because it effectually answers the argument of the opposite side, on the supposition that their interpretation of the word *conjungere* is correct; 3. because it contains the principle by means of which the objection from the later phrase "qui matrimonio interesse debebat" may be correctly solved, namely the distinction between the licit and the valid assistance of the parish-priest.

discussed decrees of the Council. This, then, is certainly a case to which may be applied the rule: "Legislator quod voluit expressit, quod noluit tacuit" (Ex cap. 12, *de Decim.*).

Furthermore, it is not true to say that the later jurisprudence would be in perfect accord with the Tridentine decree, on the supposition that the Council meant only the *parochus proprius*, that is, the *parochus* referred to in the clause on the publication of the banns, to be the valid witness of matrimony. For if the *parochus contrahentium proprius* for the publication of the banns, and the *parochus* for the validity of marriage were identical, a peculiar and unheard of situation would arise when the contracting parties belonged to different parishes. For then, since the parish-priests of both parishes have the right and duty of publishing the banns, it would necessarily follow that without the assistance of both the parish-priests, the marriage would be invalid.

But according to the canonical jurisprudence, the presence of either of the parish-priests suffices for the validity of the marriage. Therefore, even according to the present jurisprudence, the term *parochus* is not used in these two places in an identical sense: and whether it is so used, as a matter of fact, or not, the actual discipline is not in harmony with the mind of the Council of Trent (1).

---

(1) Sanchez replies to a similar argument that by reason of the unity of the contract, the *parochus* of one becomes the *parochus* of both: "ratione connexionis parochus unius est utriusque" (*De Matrim.*, l. 3, disp. 19, n. 5). The point here, however, is not whether the *pa-*

What, then, was the mind of the Council of Trent, what was its intention, what were its motives, in enacting this new law against clandestinity, and making it a diriment impediment to matrimony? Pallavicini in his History of the Council of Trent (*Istoria del Concilio di Trento*, tom. V, lib. 22) tells the story of the making of the decree, the discussions which took place, etc. The proposal to annul clandestine marriages was made to the Council by the French Orators on behalf of their Government. Accordingly, on the 20th of July, 1563, the following decree was submitted to the examination of the Fathers: — "Sacrosancta Dei Ecclesia Divino Spiritu afflata, magna incommoda et gravia peccata perpendens, quae ex Clandestinis Matrimoniis ortum habent, praesertim vero eorum qui in statu damnationis permanent, dum saepenumero priore uxore cum qua olim contraxerant, relicta, cum alia palam illicite contrahunt, et cum ea perpetuo vivunt, eadem sub gravissimis poenis alias inhibuit, non tamen irritavit. Verum, quum haec Sancta Synodus animadvertat, propter hominum inobedientiam remedium illud hactenus parum profuisse, statuit et decernit ea Matrimonia quae in posterum clam *non adhibitis tribus Testibus* contrahentur, irrita fore, aut nulla, prout praesenti decreto irritat et annullat..." The decree, then, as it was first proposed, made the presence of three witnesses necessary for the validity of marriage, but did not require any special dignity,

---

rochus of one becomes the *parochus* of both, but whether *one parochus* becomes *both parochi*. Till he accomplishes this feat, the current interpretation of the decree of Trent must be incorrect, and is inconsistent with itself.

station, authority, qualities, etc., in any of the witnesses. As Pallavicini remarks, "the decree came under the file many times" (c. 4, n. 3). The Cardinal of Lorraine, the chief spokesman for the French, said regarding clandestine marriages: "Although the offences committed against God had not been considered, but only the evils caused to the civil state, not only the utility, but the extreme necessity of annulling them were evident. Without this all the advantages gained by the State from the institution of legitimate marriages, and from the prohibition of vagrant unions, were lost. These advantages were four: unity among relatives, marital fidelity, the welfare of the offspring, and the grace of the Sacrament. The kindly feeling which results from relationship was lost, for such marriages generally bred dissension. Marital fidelity was destroyed, for, since either of the parties could deny the existence of the marriage bond, it was often broken, if not before God, at any rate in the eyes of men, and an adulteress taken to wife with impunity, while the lawful wife was driven out as a concubine. Moreover the Church was often led to reject the real marriage, and to approve of adultery as marriage. The welfare of the offspring was lost, as it often happened that the legitimate children were despised as bastards, and bastards put in their place. And finally, through so grave a sin, the grace of the Sacrament was changed into the foulness of crime. He desired that in the decree, in addition to the other solemnities, the blessing of the Priest be required for validity; so that one of the three witnesses must have the sacerdotal dignity. If the heretics wished their marriages to be blessed by their impious ministers,

much more fitting was it that this should be done in the Catholic Church, which possesses the true ministers of God and true priests" (loc. cit., n. 5). This proposition, however, was not accepted, and the blessing of the marriage was not made a condition of validity.

On the 7th of August the decree was again proposed with certain modifications, but without any change in the essential condition of the presence of three witnesses.

The first suggestion that the parish-priest should be one of the witnesses, was made in the following terms: — "To believe that the Church has this power [to annul clandestine marriages], the authority of so many great Theologians assembled in the Council who admit it, amply suffices: and some of them have said that it is not safe in faith to deny it. Everything that forms part of the Republic lies within the power of the Republic, which is the *whole,* so that the *parts* must be subject to and in harmony with it. Now among the parts of the human Republic are undoubtedly the bodies of men; therefore it can make laws regarding their disposition, as it deems opportune. Before Matrimony was a sacrament, the Republic possessed this power; nor can it be believed that the elevation of this so important and frequent contract to the dignity of a sacrament would be to the prejudice of the Republic (i. e., of course, the Christian Republic, the Church), by making it imperfect and powerless to provide for its end. Presupposing the power, the necessity is evident on account of the multitude and the gravity of the evils. And in order to meet these efficaciously, it is fitting that among the prescribed witnesses

there should be also the Parish-priest" (Pallavicini, loc. cit., n. 11). Here it is suggested that the marriage contract should be made not only publicly but also *in facie Ecclesiae*. Matrimony is a sacrament, a sacred contract, and consequently belongs to the Church, which has the power to require the fulfilment of certain conditions for the validity of the contract. It is therefore only fitting, since the evils arising from clandestinity render it necessary that the contract be made publicly, i. e. in the presence of witnesses, that one of these witnesses should be the Church's official representative, viz. the parish-priest; and thus the marriage is contracted *in facie Ecclesiae*. Accordingly the Council inserted this condition in its decree: — "Denunciationibus factis,... ad celebrationem Matrimonii *in facie Ecclesiae* procedatur."

Pallavicini, in c. 8, n. 16, 17, gives another reason for the selection of the parish-priest as a necessary witness of marriage. "It was the Royal Council of France that desired the Orators of the King to petition in his name that marriages contracted without the presence of the priest and three other witnesses be annulled; and so in fact they asked by an explicit and authentic act, on the part of the Most Christian King, in the General Congregation of the 24th of July.

"And, as was already foreseen, since the decree in its original form did not make this necessary, and it was so proposed in the said Congregation of the 24th of July, the Cardinal of Lorraine, who declared his opinion before everyone else, and who was the leader of the French, and the chief supporter of the royal demands, immediately tried to

have the form altered in this part, so that the presence of the Priest should be prescribed as essential. Nevertheless, since to require the presence of so many, and particularly of the Priest, seemed an excessive restriction of the validity, therefore, not only in the first, but in the second and the third form (or *schema*) proposed by the Committee of the Council, the presence of three witnesses only was put down as necessary, without mentioning at all the Parish-priest or any other Priest, although the Fathers, at the instance of the French, in declaring their opinions, discussed the necessity, or otherwise, of making such a condition. The majority were agreed in requiring three witnesses and not two only, as it might easily happen that one of the two should die or be absent, and thus the proof of the marriage would be lost. Then again, it was thought that it might happen too easily that marriage was contracted in the presence of three vagabonds not known to the girl; these would take themselves off, and no testimony of the act would be left, and thus we should fall back into the old difficulties: wherefore, imperfect provision was made unless a stable witness was secured who would keep a register of the marriages contracted. As such either the Notary or the Parish-priest could be appointed. The Notary did not seem suitable, for the number of Notaries is infinite, and so two defects appeared: first, that the parties, at least if they agreed among themselves, supposing that both repented of the marriage, might easily conceal the fact of the marriage; secondly, that it would have been difficult for the Magistrate to certify of anyone whether he was bound or free, or

whether the children were legitimate or not. It was added that a Notary might without much difficulty be induced, either through real or through pretended ignorance, to attest marriage between persons who were prohibited, though not by reason of a diriment impediment; as for example, if one were bound by legitimate *sponsalia* to another person; or for some misdeed he were forbidden to marry such another; or if the proclamations had not been duly made: which would not be so readily obtained from the Parish-priest, better informed as to these facts, and more afraid of ecclesiastical penalties. And although matrimony can be contracted in his presence even against his will; still illicit marriages, such as those to which some impediment is foreseen, or in which there is some dishonour, can rarely be contracted except in secluded places where it is not easy to take the Parish-priest by fraud or by force.

"These were the reasons which induced both the Bishops and the Ambassadors, and even the Princes of Christendom to come to the conclusion that the presence of the Parish-priest was necessary for validity; from which great benefits have resulted and no inconvenience. And the Ecclesiastics so kept themselves free from the desire to acquire a new right in these contracts, that when the petition of the French Orators asked that the Priest should *preside (præfuerit)* at matrimony, a word which meant more than the simple presence of a witness, namely, consent and authority, the Fathers, in order to maintain, as far as possible, liberty of contract by requiring only the security and stability of proof, did not wish that the part taken by the

Parish-priest should be more, as far as the validity was concerned, than the ministry, requested indeed but even forced, of his ears and eyes."

Throughout all this narrative it does not appear that any of the Fathers of Trent ever suggested the necessity of the *parochus proprius*, but only of the *parochus*. Moreover, the two great objects which the Council wished to secure through the presence of the parish-priest, viz. the celebration of the marriage *in facie Ecclesiæ*, and the security and stability of the proof of the marriage, did not require the presence of the *parochus proprius contrahentium*, but could be attained equally well by the presence of any parish-priest acting in his own territory. The only reason adduced that might seem to point to the necessity of the *parochus proprius* is that which is concerned with the prevention of illicit marriages; since, it may be argued, the *parochus proprius* is the one who would have a knowledge of the impedient impediments alluded to. It does not at all follow, however, that this was the meaning of the Fathers, for all that is said is, that a parish-priest would be better informed about these things than a notary, which is an obvious statement. But let us suppose that the *parochus proprius* was really meant in this particular instance; for it will be worth while to argue the matter out on this basis, because it seems clear that Pallavicini, writing nearly a hundred years after the Council of Trent (the discussion of the Council on clandestinity took place in 1563, Pallavicini's history appeared in 1656), and when the doctrine of the necessity of the *parochus proprius* for the validity of matrimony was in full vigour, has confused two

very different things, viz. the necessity of the *parochus proprius* for the *licit* celebration of marriage, and the necessity of the *parochus* for its validity. Yet the distinction is manifest to one who looks for it, both in Pallavicini's own narrative and in the Tridentine decree *Tametsi* (1).

The historian, then, tells us that one of the reasons why the Council chose the Parish-priest as the one whose presence would henceforth be necessary for the validity of the Sacrament of Matrimony, in preference to the Notary, was that the presence of the parish-priest would be more likely to prevent the celebration of *illicit* marriages, that is, to which there existed some *impedient* impediment.

But it seems impossible that this could really have been one of the Council's motives for introducing the *parochus* into the annulling clause. For to insert a condition upon which the *validity* of marriage depends, in order to ensure the observance of a law which is merely *prohibitive*, would be practically equivalent to converting impedient into diriment impediments; nay, it would make the mere possibility of the concealment of impedient impediments into an actual diriment impediment. If the Council had changed these impedient into diriment impediments, as it actually did change the impediment of clandestinity, there would have been reason for

---

(1) It is necessary to distinguish between Pallavicini's own views, and his narrative of the discussion in the Council. There is no doubt that he himself believed that the Council meant the *parochus proprius* in the invalidating clause (see *History*, loc. cit., c. 8, n. 13). The question, however, is not about his personal opinions, but about what really took place at Trent.

making the validity of the Sacrament depend upon the presence of someone who was likely to know whether such impediments existed or not; but as long as the impediments in question remained only impedient — and the Council did not make any change nor did it desire to do so — the chance or danger of their existence could not be made a ground for invalidation.

On the other hand, the Council did just what one would expect, in the hypothesis that it wished to do something to secure respect for the impedient impediments, and just what exactly accords with the reason given by Pallavicini for the selection of the parish-priest ("meglio informato di questi fatti, e più timoroso delle pene ecclesiastiche," — "better informed of these facts, and more afraid of the ecclesiastical penalties"). For in the third part of this very decree *Tametsi*, the Council forbids, under pain of suspension, any parish-priest other than the *parochus proprius* to celebrate or bless the marriage. This is the correct, as it is a quite adequate, mode of securing the observance of the law on impedient impediments, viz., by reserving the *licit* celebration to the *parochus proprius*, as he is likely to be "better informed about the facts" — "meglio informato dei fatti," — and by imposing a severe penalty upon any other priest who should venture to celebrate (1) a marriage without the permission of

---

(1) The word *celebrate* means to solemnize with the full ecclesiastical ceremonial and it is to the illicit solemnization of marriage that the penalty is attached (see above, p. 105, note). This is an adequate safeguard of the law of impedient impediments, even though presence at the

the *parochus proprius*, for it is very unlikely that a priest — "more afraid of the ecclesiastical penalties" "più timoroso delle pene ecclesiastiche," as Pallavicini says, — would incur the heavy penalty of suspension in order to marry a couple of strangers. This then is an adequate sanction of the law of the impedient impediments; but invalidation would be a most inappropriate remedy, and one absolutely out of proportion to the evil.

Moreover, the very phrase — "più timoroso delle pene ecclesiastiche," — is suggestive not of invalidation, but of prohibition and illicit action and penalty, and shows that the latter is what the Tridentine Fathers had in their minds in this particular instance. They were making the assistance of any parish-priest other than the *parochus proprius* at a marriage illicit, not invalid.

This is strongly confirmed by the passage already quoted from *cap. 13, de Reformatione* of this session, in which the bishops are ordered to erect distinct parishes each with its own permanent parish-priest, "*qui eas* (*animas*) *cognoscere valeat, et a quo solo licite sacramenta suscipiant.*" The *qui eas cognoscere valeat* very closely resembles the *Parrochiano meglio informato di questi fatti*, recorded by Pal-

---

actual contract is not censured; for just as the Council could afford to disregard, on account of its rarity, the case of marriage before an unwilling parish-priest whose presence is due to fraud or violence (see Pallavicini *supra*, p. 117); so, and with even greater reason, could the Fathers leave out of account so remote a contingency as that of a parish-priest illicitly yet voluntarily assisting at a marriage and omitting the rite of the Church.

lavicini; and the fact that the Council here (in c. 13) connects the *licit* administration of the Sacraments with a knowledge of his parishioners on the part of the parish-priest (for interdependence is obviously implied between the two relative clauses), shows that in the decree *Tametsi* it intended only the *licit* celebration of matrimony to be reserved to the *parochus proprius*. The one is the general principle that the *parochus proprius* is the *legitimate* minister of the Sacraments; the other in the particular application of that principle to Matrimony. It is to be noted, in corroboration of this last point, that the decrees on Matrimony and the later decrees *de Reformatione* of the twenty-fourth session, were under discussion in the Council at exactly the same period. (See Pallavicini, ll. 22 and 23).

Furthermore, the object which the Council had in view in invalidating clandestine marriages, was certainly not the safeguarding of the impedient impediments. From the history of the decree and from the decree itself we learn that the Council's purpose was to put a stop to the crimes of repudiation of the lawful wife secretly married, the simulation of marriage in public with another woman, and a life of adultery. Sometimes even, we are told, men after marrying clandestinely, put away their wives and took Holy Orders. These were the evils that the Council of Trent was endeavouring to eradicate. It is true that one of the means of gaining publicity for the marriage is by the proclamation of the banns; but this was not ordered by the Council under pain of the nullity of the marriage. It would therefore be most inconsistent to regard the danger of the omission of the banns as

a sufficient reason for invalidating the marriage. And the fact that this impediment is grouped with those of *Sponsalia* and *Ecclesiæ vetitum* shows that the Council was considering the omission of the proclamations not precisely as an obstacle to the publicity of the marriage, but merely as something prohibited, i. e. as an *impedient impediment formaliter qua tale*, and therefore as affecting only the *licit* celebration of the marriage. The safeguarding of the impedient impediments, from their very nature, could not be a motive for the invalidation of marriage. And even supposing, *per impossibile*, that marriage were invalidated on this account, the diriment impediment thus constituted would certainly not be the impediment of clandestinity. Still another diriment impediment would have been created; but of such the Church has absolutely no knowledge.

But the safeguarding of the impedient impediments is a reason that exactly accounts for and corresponds with the third part of the decree *Tametsi*. And when we note that Pallavicini himself mentions this as only an additional, a supplementary reason, and not the substantial motive for the invalidation of clandestine marriages, it is easy to see that it was put forward by the Fathers of Trent only as a reason for insisting on the presence of the *parochus proprius* for the *licit* celebration of marriage. Pallavicini, writing from various documents so long after the events he was recording, and making no distinction between lawfulness and validity as regarded the presence of the *parochus proprius*, confused the two ideas, and assigned to the annulling clause a reason which belonged to

the third part of the decree. In any case, this could never be a reason for declaring marriages both clandestine and invalid, when contracted in the absence of the *parochus proprius*.

It remains now to examine the real reasons which determined the Council of Trent to select the *parochus* as one whose presence would be necessary for the validity of matrimony; in order to ascertain whether they contain anything which seems to designate the *parochus contrahentium proprius* as the only *parochus* who can validly assist at marriage.

Having proposed to invalidate clandestine marriages, it was necessary that the Council should impose such conditions regulating the external form of matrimony as would render its legislation effectual. The first thing to secure, then, was the publicity of the marriage: which was done by requiring the presence of witnesses. The number of the witnesses was fixed at *three*, in order the better to ensure the permanence of the proof of the marriage. But even this was not sufficient; for the Fathers of the Council perceived that "imperfect provision was made, unless a stable witness was secured who would keep a register of the marriages contracted" (Pallavicini, already quoted): and comparing the merits of the Notary and the Parish-priest from this standpoint, they decided that the latter was the proper person to choose, as being one who, by reason of his sacred office and character, would be an absolutely trustworthy witness, unexceptionable, above all suspicion; and who, holding a position both permanent and unique as far as his own parish was concerned ("The Notary

did not seem suitable, for the number of Notaries is infinite:" Pallavicini, *ut supra*), was the best means of obtaining the desired "security and stability of proof" (ibid).

Secondly, the contract of Christian marriage is a Sacrament, instituted by Jesus Christ, and entrusted by Him to the guardianship of the Church, who therefore has always from the earliest times insisted on the obligation of treating marriage as a sacred thing, an act of religion, and consequently an act which, to be performed worthily, must be done with her cognizance and under her auspices, in a word, *in facie Ecclesiæ*. "Hujus disciplinæ testimonium nobis perhibent antiquissimi Patres. Etenim S. Ignatius, *epist. ad Polycarpum, num. 5*.... ait: 'Decet vero ut sponsi et sponsæ de sententia Episcopi conjugium faciant, quo nuptiæ sint secundum Dominum, et non secundum cupiditatem. Omnia ad honorem Dei fiant'... Tertullianus *lib. 2. ad Uxorem cap. 8. edit. Paris. an. 1634. pag. 191.* scribit: "Unde sufficiamus ad enarrandam felicitatem ejus matrimonii, quod Ecclesia conciliat, et confirmat oblatio, et obsignat benedictio?' Et *lib. de pudicitia, cap. 4.* 'Ideo penes nos occultæ quoque conjunctiones, id est, non prius apud Ecclesiam professæ, juxta mæchiam et fornicationem judicari periclitantur, etc.'... Hæc aliaque hujus generis multa, a viris eruditis congesta, probant quidem semper ab Ecclesia vetita clandestina conjugia" (Benedict XIV, De Synod. Diœces. l. VIII, c. 12, nn. 3, 4). This then is one of the reasons for which, as the Council of Trent says in the decree *Tametsi*, the Church has always detested and prohibited clandestine marriages: — "Clandestina matrimonia... sancta Dei

Ecclesia ex justissimis causis semper detestata est atque prohibuit." "Verum," continues the decree, "cum sancta Synodus animadvertat, prohibitiones illas, propter hominum inobedientiam, jam non prodesse," it proceeds to order the proclamation of the banns, and then "ad celebrationem matrimonii *in facie Ecclesiæ* procedatur." This then is another reason why the parish-priest was chosen; for he is the official representative of the Church in his parish, and so, acts which are performed before him in his official capacity are done *in facie Ecclesiæ*.

The two reasons, therefore, why the Council of Trent enacted that marriage contracted in the absence of the parish-priest should henceforth be invalid on the ground of clandestinity, are 1° to secure the publicity of marriage, and 2° to secure its celebration *in facie Ecclesiæ*. And if we consider the two ideas that are contained in the essence of Christian marriage, viz., contract and Sacrament, we shall see at once that these two reasons arise from the very nature of clandestinity in relation to matrimony. For if marriage is regarded in its aspect as a contract, *clandestine* is directly opposed to *public;* if it is viewed as a Sacrament, then *clandestine* and *in facie Ecclesiæ* are contradictory. I mention this to show that the parish-priest was chosen as the necessary witness for the validity of marriage for reasons directly connected with clandestinity and its prevention, and not from extraneous motives; so that it can truly be said that marriage contracted in the absence of the parish-priest is clandestine, both as not having due publicity, and as not being celebrated *in facie Ecclesiæ*. (In speak

ing thus of matrimony as contract and sacrament, I must not be understood to mean that these are two really distinct parts or constituent elements of its essence. They are two inadequate aspects of the one, indivisible, metaphysical essence of Matrimony which is wholly contract and wholly sacrament. Contract and sacrament therefore are ontologically identical. It is the physical essence of the sacrament as such that is divisible, not, of course, into contract and sacrament, but into matter and form).

Benedict XIV. puts these two reasons well and concisely in the following passage of his *De Synodo Diœcesana, l. XIII, c. 23, n. 6:* "Parochus interest matrimonio tamquam *testis auctorizabilis pro Ecclesia;* quæ, cum in aliis duobus aut tribus testibus, ad matrimonium rite contrahendum necessariis, non eas qualitates requirat, quæ illos omni exceptione majores constituant,... idcirco Parochi præsentiam voluit, *ut in illius probitate maximum veritatis fundamentum statueret:* uti colligitur ex Historia dicti Concilii scripta a Cardinali Pallavicino *lib. 22, cap. 4, num. 3, et num. 12.* Parochus autem non potest testem agere *tantæ in Ecclesia auctoritatis,* nisi et videat contrahentes, etc." (Italics mine). Also Gasparri *op. cit. n. 1044:* "Parochus, aliusve sacerdos de parochi aut Ordinarii licentia assistens matrimonio, est quidem minister ritus religiosi accidentalis qui comitari solet contractum matrimonialem, sed non est minister ipsius contractus et sacramenti, nec, dum assistit contractui, exercet ullam potestatem aut ordinis aut jurisdictionis; sed assistit, tamquam testis qualificatus, *auctorizabilis,* ut aiunt, pro Ecclesia, seu testis cui Ecclesia fidem habet. Nempe

Conc. Trid. voluit matrimonium ita celebrari ut de illius celebratione nullum superesse posset dubium... Sicut notarius est testis auctorizabilis pro auctoritate civili, ita parochus pro Ecclesia in re matrimoniali." Both reasons, therefore, are comprised in the canonical term *testis auctorizabilis* or *qualificatus*, which accurately describes the position of the parish-priest and the part taken by him in the celebration of a marriage, as far as its validity is concerned.

The question now is: Is there anything in either of these two reasons, which requires us to interpret the term *parish-priest* as referring to the *parochus contrahentium proprius* alone, the *parochus* of domicile (for the Fathers of Trent knew nothing of quasi-domicile); so that a parish-priest, according to the intention of the Council of Trent, could assist validly at the marriages of his parishioners only? The true answer is, I think, that not only is there nothing in the reasons themselves to warrant such an interpretation, but that they clearly show the contrary.

What then is marriage *in facie Ecclesiæ?* (1) It is marriage celebrated in the presence of the duly

---

(1) The phrase *in facie Ecclesiae* had its origin in a custom of our Catholic forefathers of pre-Reformation days. The essential portion of the ceremony, viz., the interchange of consent by the contracting parties, took place before the parish-priest, not in the church, but outside the church door, so that the marriage was contracted literally *in facie Ecclesiæ*. Then they entered the church for the completion of the ceremony, the nuptial Mass, and Holy Communion. "Quoniam," writes Father Wernz, (op. cit., n. 156), "complures solemnitates Germanorum minus convenienter in ipsa ecclesia parochiali fieri potue-

accredited and official representative of the Church. He is the Ordinary in his diocese, and the parish-priest in his parish. Priesthood alone, i. e. Order, is not sufficient to make a person the official representative of the Church, nor is it even necessary. What is required is legitimate mission, authority, jurisdiction, or at least the possession of a jurisdictional office, as that of the Ordinary or parish-priest. Now the jurisdiction of a parish-priest is primarily or fundamentally *territorial*, that is, the inhabitants of a district become subject to the parish-priest, because he has received jurisdiction over that particular territory, and therefore over the persons who dwell therein. (There are in existence some *parochiæ gentilitiæ*, the parish-priests of which have direct personal jurisdiction over certain families. Such parishes exist within a territorial parish, are quite exceptional, and need not enter into the present discussion.) It follows, then, that a parish-priest can act as the official representative of the Church within his parish and in regard to his own parishioners. This of course is not in dispute; he is their *parochus proprius*, possessing

---

runt v. g. traditio gladii per mundualdum sponsæ, lectio pactorum dotalium, Germani pro suo more negotia publica in publicis campis transigendi, etiam nuptias celebrarunt publice *ante portas ecclesiae* i. e. litteraliter '*in conspectu* sive *facie Ecclesiæ*,' in quam postea ingressi sunt, ut assisterent sacrificio Missæ et reciperent sacram communionem. Quæ disciplina celebrandi nuptias ante portas ecclesiæ in Gallia et Anglia usque ad sæculum decimum sextum fuit in vigore."

The Right Rev Abbot Gasquet, O.S.B., gives a short account of the English custom, in his "*Parish Life in*

a personal jurisdiction over them by reason of their domicile or quasi-domicile in the territory subject to him.

But it follows also from the fact of his possession of territorial jurisdiction in his parish, that the parish-priest is the official representative of the Church for all comers, and can act as such, so long as such action does not involve the exercise of personal jurisdiction over persons not subject to him. Now marriage is exactly a case in point. Both according to the Council of Trent and according to the existing matrimonial discipline, the assistance of the parish-priest at a marriage is not an act of jurisdiction. For, as Pallavicini says in the passage quoted above; "When the Petition of the French Orators asked that the Priest should *preside* (*præfuerit*) at matrimony, a word which meant more than the simple presence of a witness, namely, consent and authority, the Fathers, in order to maintain, as far as possible, liberty of contract by requiring only security and stability of proof, did not wish that the part taken by the Parish-priest should be more, as far as the validity was concerned, than

---

Mediæval England" (p. 209): "On the day appointed for the marriage, at the door of the church, the priest shall interrogate the parties as follows:

"*N.* Hast thu wille to have this wommon to thi wedded wif.

"*R.* Ye sir. My thu wel fynde at thi best to love hur and hold ye to her and to no other to thi lives end. *R.* Ye syr. Then take her by yor hande and say after me: I *N.* take the *N.* in forme of holy chyrche to my wedded wyfe, forsakyng alle other, holdyng me hollych to the, in sekenes and in hele, in ryches and in poverte, in

the ministry, requested indeed but even forced, of his eyes and ears." And Gasparri bears witness both for the Council and for the jurisprudence now in force: "Juxta relatum decretum Tridentinum parochus... assistens matrimonio.... non est minister ipsius contractus et sacramenti, nec, dum assistit contractui. exercet ullam potestatem aut ordinis aut jurisdictionis; sed assistit tamquam testis qualificatus, auctorizabilis, ut aiunt, pro Ecclesia" (n. 1044). A parish-priest, then, who assists at a marriage in his own parish, acts as the official representative of the Church, even though the contracting parties are not his own subjects; and therefore the marriage is contracted *in facie Ecclesiae*.

And yet such a marriage is, according to the present discipline, clandestine and invalid. Can this be at all explained? I believe the explanation to be this. The official who acts as the representative of the Church must possess ecclesiastical jurisdiction, or at least the jurisdictional office of parish-priest. From this antecedent theologians and canonists inferred that he must possess parochial jurisdiction *over the contracting parties*, or at least

---

well and in wo, tyl deth us departe, and there to I plyght ye my trowthe!

"Then the woman repeated the form as above.

"It was this 'Marriage at the church door' which had to be established, according to Bracton, in any question as to the legality or non-legality of the contract. After this 'taking to wife at the church door,' the parties entered the church and completed the rite in the church itself."

Hence, by marriage *in facie Ecclesiæ*, came to be understood marriage according to the rite of the Church, as opposed to clandestine marriage: and it is clear from

be *their* parish-priest. This is most inconsequent. For the reason why the parish-priest requires jurisdiction, or at least the parochial office, when he assist at a marriage, is not because he is exercising authority over the contracting parties, for he is not doing so: but because without at least the parochial office he would not be qualified to represent the Church at the marriage. It is not his jurisdiction over the contracting parties that matters, but his official position as the Church's representative at the ceremony; for whether the marriage is contracted *in facie Ecclesiae* or not, depends precisely on this. It would seem that two very different things have been confounded together, viz, the relation of the parish-priest to the Church as her official representative in his own little portion of the Lord's vineyard, and the relation of the parish-priest to the contracting parties of the marriage. Theologians and canonists have required the existence of the second relation, that of parochial, personal jurisdiction over the contracting parties. But the Council of Trent, when dealing with the validity of the contract, thought only of the relation of the

---

the custom described above that the phrase is more properly used of the essential contract, the exchange of consent before the parish-priest, than of the subsequent ecclesiastical cerimonial. This is expressed, too, in the essential words of the Ritual, by which the mutual consent is given. Thus, the Roman Ritual has:

"*N.* vis accipere *N.* hic præsentem in tuam legitimam uxorem [tuum legitimum maritum] *juxta ritum Sanctæ Matris Ecclesiæ?* *R.* Volo." The present English Ritual translates the Roman: "*N.* Wilt thou take *N.* here present, for thy lawful wife [husband], *according to the rite*

parish-priest to the Church, as her officer who represents her at the marriage. For, once again, the object of the Council was to prevent clandestine marriages, to invalidate all the marriages of Catholics not contracted publicly and *in facie Ecclesiae*; and so it required that all marriages should be celebrated *praesente parocho, et testibus*: but it positively repudiated any idea of the exercise of jurisdiction by the parish-priest over the contracting parties (see Pallavicini, l. 22, c. 8, n. 17, quoted above); and the existing discipline agrees in this with Trent. All that is required of the parish-priest is his presence — *praesente parocho* — as the Church's official representative, witnessing on her behalf and in her name the contract that is being made. Hence, I say, the jurisdiction of the parish-priest over the contracting parties cannot enter into the question of validity at all. It is simply a question of the position of the parish-priest in relation to the Church, as her official representative in a particular locality — "testis auctorizabilis pro Ecclesia, testis tantae in Ecclesia auctoritatis," as says Benedict XIV.

The result of not distinguishing between these

---

of our holy Mother the Church? R. I will." And in the ancient ritual quoted by Abbot Gasquet in the extract given above, we read:

"I *N.* take the *N. in forme of holy chyrche* to my wedded wyfe, etc."

This it is, viz., the making of the contract before the official representative of the Church, and therefore *in facie Ecclesiæ*, that the Council of Trent required for the validity of Catholic marriages wherever its decree was published; and it is this that the Holy See now requires for the validity of marriage throughout the Universal Church.

two relations of the parish-priest, viz., to the Church and to the contracting parties, may be illustrated from Sanchez, *De Matrim., lib. 3.* In *disp. 19, n. 2,* he uses the following argument to prove the necessity of the presence of the *parochus proprius* for the validity of marriage: — "Secundo nam illius parochi praesentia necessaria est, qui potest alii sacerdoti licentiam assistendi matrimonio concedere: ut constat ex illis verbis ejusdem Conc. (Trid.), sess. 24, c. 1: "Qui aliter quam praesente parocho, vel alio sacerdote de ipsius parochi licentia"; sed *solus proprius parochus est, qui potest hanc licentiam concedere, alius enim jurisdictionem non habet in contrahentes:* ergo solus ille poterit matrimonio assistere." (Italics mine.) Therefore, according to Sanchez, the parish-priest must possess jurisdiction over the contracting parties, in order either to assist personally at a marriage or to delegate a substitute. Yet in *disp. 21* he teaches that although a *parochus excommunicatus vel suspensus non toleratus* is bereft of all jurisdiction (*n. 1*; see above, *c. 2,* § 1, page 90-1, 94), yet he validly assists at a marriage, because such assistance is not an act of jurisdiction (*n. 4*); and also validly delegates another priest to act as his substitute, for neither is this an act of jurisdiction (n. 7). Contradiction could hardly be more direct and manifest.

And confusion is worse confounded by the argument which Sanchez uses to prove his point. He says: "Sit conclusio, matrimonium contractum coram parocho excommunicato, suspenso, vel irregulari, non tolerato, est validum. Probatur, quia præsentia parochi requiritur in matrimonio, quasi auctoritatem præstans illi, per potestatem quam

habet in subditos: ut docet Navar... Sed auctoritatem præstare actui sua præsentia, non est actus jurisdictionis: ergo potest valide fieri ab excommunicato non tolerato" (loc. cit., n. 4). But what is this "potestas quam habet in subditos," if it is not parochial jurisdiction? And this *ex hypothesi* he has been deprived of by his excommunication or suspension. Such a parish-priest has no "potestas in subditos," by means of which he can lend authority to their act of contract.

But he still possesses, even in the state of excommunication or suspension, the office of parish-priest, which makes him the official representative of the Church in his parish. This it is that enables him to lend authority to the act of contract, not a "potestas in subditos" which he does not possess. And this is the real reason why the existing matrimonial jurisprudence admits the validity of the assistance of a parish-priest who has lost his jurisdiction: it depends on his relation to the Church, not on his relation to his parishioners.

The words of Sanchez alluded to above on the validity of delegation are:—"Secunda sententia, probabilior, ait [concedere parochum licentiam alteri sacerdoti assistendi matrimonio] non esse actum jurisdictionis, ac proinde tam licentiam sic concessam, quam matrimonium valere. Probatur quia concessio illius facultatis non est actus parochi, formaliter in quantum habet jurisdictionem, sed in quantum est testis legitimus matrimonii, et simul habens facultatem substituendi ad eum actum testificandum: sed si aliquis haberet mandatum ad contrahendum nomine alterius, potestatemque substituendi, illa substitutio est quidem actus potestatis substituendi, non

tamen est actus jurisdictionis, ut constat, valideque ab excommunicato fieret: ergo valide conceditur ea licentia a parocho non tolerato" (*disp. 21, n. 7*). This is the true doctrine on this point, and it effectually destroys the minor premise of the argument quoted above from *disp. 19, n. 2:* "Solus proprius parochus est qui potest hanc licentiam concedere, alius enim jurisdictionem non habet in contrahentes:" by means of which the author attempts to prove the necessity of the presence of the *parochus proprius* for the validity of matrimony.

It is true that by the new Decree, the Church insists on the parish-priest having the actual possession and the valid exercise of his parochial jurisdiction (see § 1 of this clause, page 94-5); but this does not mean personal jurisdiction over the contracting parties. For, by the section now under discussion, the parish-priest receives power to assist validly at the marriages not only of his subjects, but also of any persons not under his jurisdiction, provided that they are married in his parish:— "matrimoniis nedum suorum subditorum, sed etiam non subditorum valide assistunt" (Decree, IV, § 2). It is *territorial*, not *personal* jurisdiction that is meant:—"intra limites dumtaxat sui territorii" (ibid.); so that elsewhere he cannot marry even his own subjects. The Church requires for the future that marriage be celebrated in the presence of him who possesses the office and jurisdiction of parish-priest, not because he is thereby placed in a position of authority over the contracting parties, but because these are the qualifications which make him her fully accredited official representative *in that locality, in that parish;* so that *within that territory* he

can act on her behalf, in her name, and with her authority; and acts that are performed in his official presence are done *in facie Ecclesiæ*, no matter whether they are the acts of persons belonging to his parish, or the acts of strangers.

The general conclusion of the argument, as far as it has gone, therefore is:

1° that for the celebration of marriage *in facie Ecclesiæ*, the presence of the parish-priest is necessary as the "testis auctorizabilis pro Ecclesia,"—the Church's official witness;

2° that there is nothing either in the nature of his concurrence in the sacramental act, or in the mind of the Council of Trent, that requires the parish-priest to possess personal jurisdiction over the contracting parties; but

3° that, as the Church's official representative, he must hold the territorial office and jurisdiction of parish-priest of the district or locality in which the ceremony takes place; and consequently

4° as far as marriage *in facie Ecclesiæ* is concerned, neither the nature of the act nor the Council of Trent requires the presence of the *parochus contrahentium proprius*, but only of the *parochus* of the parish in which the marriage is solemnized.

We must now consider marriage under its other aspect, viz., as a contract. From this point of view, *clandestine* is opposed to *public*. I have already shown above, from Pallavicini's "History of the Council of Trent," that the Council chose the parish-priest as a necessary witness, in order to ensure the publicity of the marriage, and "the security and stability of its proof." Is there anything in this motive of the Council that suggests the

necessity of the *parochus contrahentium proprius?* Let us see.

Having agreed that there must be three witnesses, the Fathers decided that one at least must be a person of trust and of official position, whose duty it would be to keep a record of the marriages in which he acted as witness: — "Imperfect provision was made unless a stable witness was secured who would keep a register of the marriages contracted. As such either the Notary or the Parish-priest could be appointed" (Pallavicini, *ut supra*). So far, then, there is no hint of the *parochus proprius*. Every parish-priest can and does keep a register. In fact, any public official can discharge this duty, as the Council perceived, and so from this point of view they considered that a Notary would be as suitable as a Parish-priest.

But other considerations then arose which excluded the Notary; for as notaries are so numerous, a marriage could by collusion be easily concealed, and legal questions might arise as to the fact of the marriage, the legitimacy of children, etc., as legal proof would in many cases be difficult. So the Council decided in favour of the parish-priest; but, "in order to maintain, as far as possible, liberty of contract by requiring only security and stability of proof, the Fathers did not wish that the part taken by the parish-priest should be more, as far as the validity was concerned, than the ministry, requested indeed but even forced, of his eyes and ears" (Pallavicini, *ut supra*). I confess that I still see no indication of the *parochus proprius*. The notaries are excluded because there are so many of them. The parish-priest, therefore, is preferred

clearly because there is only one person who occupies that office in a particular locality: so that concealment becomes much more difficult, the legal questions alluded to above could hardly arise, and "the security and stability of proof" is assured. The *parochus proprius,* as such, has not a more favoured position than any other parish-priest. He cannot keep a register any better; his position is not more stable or permanent; he is not a more trustworthy witness than his brethren, or than himself when he is not the *parochus proprius* of the contracting parties: nor are marriages celebrated before him more public than they would be if celebrated in the presence of any other parish-priest. Therefore there is nothing from the point of view of publicity to show that it was the intention of the Council of Trent to make the presence of the *parochus proprius* necessary for the validity of marriage.

The Rev. Professor Lombardi, in the *Volum* mentioned above, uses the following argument to prove that the Council of Trent meant the *parochus proprius* (*Acta S. Sedis*, vol. 40, p. 545, not. 2): — "Requiri parochum proprium juxta Tridentinum probari... c) ex communi modo dicendi, nam eadem ratione qua secundum communem sensum, si dicitur instrumentum fieri debere *coram notario*, licet generatim adire quemlibet, quia plures sunt; quando dicitur e contra actum faciendum esse *coram syndico*, intelligitur proprius, quia unicus est. Sunt enim termini correlativi parochus et parochianus, et quoad non parochianum parochus haud parochus est." — When an act is to be done before the *mayor,* says the Professor, "intelligitur *proprius*, quia uni-

cus est." Surely there is no warrant for this inference. It should be: "intelligitur *localis*, quia unicus est." A mayor has no jurisdiction outside the territory of his city or township. If a Londoner had to perform an official act requiring the presence of the mayor, say in New York, he would not summon the Lord Mayor of London across the Atlantic, but he would apply to the Mayor of New York: or he would return to London, where the Lord Mayor, who could have done nothing for him, even if he had made the journey to New York, would be able to help him. Professor Lombardi has instanced an obvious case of *local* jurisdiction. In fact, Cardinal Gennari, commenting on this section of the Decree, says that this new prescription of the canon law, by which the parish-priest can validly assist at marriage only within his own territory, is in harmony with the civil law, which requires the marriage ceremony to be performed in the presence of the *local mayor*, and not beyond the boundaries of the place. — "Questa prescrizione canonica è conforme a quella civile che vuole la formalità matrimoniale celebrata innanzi al sindaco del luogo, non oltre i confini del luogo" (Cardinal Gennari, *Breve Commento della Nuova Legge sugli Sponsali e sul Matrimonio*, p. 24) (1). I admit,

(1) Likewise the Secretary of the S. C. of the Council, Mgr (now Cardinal) De Lai, in his *Votum* on the Decree *Ne Temere*, wrote: "Omnia suadent ut potestas parochorum quoad matrimonii celebrationem reddatur territorialis. Præ primis enim *quum omnes civiles Codices hoc principium utpote opportunius adoptaverint in actis celebrandis nuptiarum uti aiunt civilium*, non suppetit sufficiens ratio cur Ecclesia illud non sequatur in matrimoniali materia." (*Acta S. Sedis*, vol. 40, p. 564, note 2).

therefore, the parallel drawn between the mayor and the parish-priest, as far as it goes; and conclude: — "intelligitur parochus localis, quia unicus est." I find it difficult to believe that the Council of Trent intended parish-priests to go about the world marrying people outside their own territory and jurisdiction, on the ground that one or other of the contracting parties had a domicile within their jurisdiction.

Professor Lombardi continues: — "Sunt termini correlativi parochus et parochianus, et quoad non parochianum parochus haud parochus est." But also *parochus* and *parochia* are correlative terms, and the *parochus* is always *parochus* as long as he is in his parish (1). Has he not, as *parochus of his parish*, power to absolve validly even non-parishioners who come within his territory? And this is an act requiring jurisdiction over the penitent, while his presence at marriage is not an act of jurisdiction. If then he can be *parochus* as regards non-parishioners for the Sacrament of Penance, there is nothing in the nature of things to prevent him from being the *parochus* in reference to non-parishioners for the Sacrament of Matrimony, of which he is not even the minister, but only the official witness.

The essence of publicity lies in knowledge: but it is, after all, a matter of degree. A fact is public when it is known,—but, to how many persons?

---

(1) Indeed, the relation between the parish-priest and his parish is prior and more fundamental than that between the parish-priest and his parishioner, and this latter relation is engendered by the former (see above p. 129).

There is undoubtedly an absolute *minimum* dividing publicity from secrecy; but the *maximum* of publicity will not be attained till the day of the last judgment.

In the present life, then, a fact is more or less public, according as it is known to a greater or less number of individuals. Now, the law has the right to require as a condition of the validity of certain acts, that they be performed publicly, that is, in the presence of witnesses: and it also has the right to assign the *minimum* number of witnesses necessary to give legal publicity to the act. The legal *minimum* may vary according to the nature and importance of the act. Thus the present Decree *Ne Temere* requires that both betrothal and marriage shall be contracted publicly: but for the publicity of the former two witnesses suffice, or even one only, if he be the parish-priest or the Ordinary; while for the latter three witnesses are absolutely indispensable, one of whom must be the parish-priest, or the Ordinary, or a delegate. Now, the Council of Trent, as is clear from Pallavicini's History (*ut supra*), in constituting the impediment of clandestinity, and assigning the *minimum* of publicity necessary for the validity of matrimony, had to consider not only the necessity of preventing the evils of secret marriages, but also the necessity of preserving the liberty of contract: and therefore it aimed at putting the indispensable *minimum* of publicity as low as possible. Hence it rejected the proposal of the French that "marriages contracted without the presence of the priest and three other witnesses be annulled." The reason for the rejection is given as follows: — "Since to require the pre-

sence of so many, and particularly of the Priest, seemed an excessive restriction of the validity, therefore, not only in the first, but in the second and the third form (or *schema*) proposed by the Committee of the Council, the presence of three witnesses only was put down as necessary, without mentioning at all the Parish-priest or any other Priest, although the Fathers, at the instance of the French, in declaring their opinions, discussed the necessity, or otherwise, of making such a condition." The Fathers agreed, however, that three witnesses were necessary: — "The majority were agreed in requiring three witnesses and not two only, as it might easily happen that one of the two should die or be absent, and thus the proof of the marriage would be lost." Throughout, they were intent of securing the proof of the marriage with the *minimum* of restriction on the liberty of contract. In fact, legal publicity consists in the capability of proof of an act by means of the testimony of witnesses. But as the oral evidence of witnesses cannot always be obtained, the Fathers perceived the necessity of providing for the preservation of their evidence in documentary form; and therefore required that one of the three witnesses should be a public official whose duty it would be to keep a marriage register. Further considerations of facility of proof, trustworthiness, etc., induced them to select the parish-priest as this necessary official witness. But they positively excluded any exercise of authority on the part of the parish-priest, and this explicitly "in order to maintain as far as possible, the liberty of contract by requiring only the security and stability of proof." This not only does not

point to the necessity of the *parochus proprius*, but positively excludes that necessity, and clearly indicates the *parochus localis* as the one whom the Council had in mind. It is not easy to calculate the proportion with precision, but only a little reflection is required to show that the restriction placed on the liberty of contract is immensely greater if the presence of the *parochus proprius* is required for the validity of marriage, rather than that of the *local* parish-priest. The principle of the Council was: "Liberty of contract as far as is compatible with the security and stability of proof." The principle would be infringed by insisting on the presence of the *parochus proprius*, for the security and stability of proof are sufficiently assured by the presence of the local parish priest. And so the Council did not mention the *parochus proprius*, but only the *parochus*, when it decreed the conditions necessary for the validity of marriage.

I come now to my final argument, namely, the testimony of the S. Congregation of the Council (1).

---

(1) Father Pius de Langogne quotes two early decisions of this S. Congregation, given before the discipline of the quasi-domicile came into vogue, as evidence that marriage before the local parish-priest was held to be not clandestine but to fulfil the conditions of Trent. These two cases are recorded by Fagnani (in cap. *Significavit 5 de Parochiis*, lib. 3, p. 1, p. 386, nn. 36-37): "Cum olim juvenis nobilis et meretrix Senensis cuperent invicem matrimonio copulari et dubitarent ne, si matrimonium in civitate Senarum contraherent, adhibendo Concilii Tridentini solemnitates, juvenis parentes impedimento essent, Romam accesserunt, ibique aliquantisper commorati, coram parocho et testibus S. Anastasiæ, in cujus parochia tunc habitabant, matrimonium per verba de præsenti contraxe-

On the 20th of May, 1905, this S. Congregation passed the following resolution: "That the opinion of two canonists be asked, in preparation for a decree modifying the matrimonial legislation relating to the chapter *Tametsi*, keeping in view the following fundamental points: *a*) that the parish-priest must assist at matrimony by request and voluntarily, so that all surprise marriages may be abolished; *b*) that no parish-priest should assist at the marriage of persons who are not his parishioners, nor even of his parishioners who have resided away

---

runt. Et cum de ejus validitate dubitaretur, S. Congregatio censuit matrimonium esse validum ea ratione, quia is est proprius parochus, in cujus parochia habitabant contrahentes, tempore contractus (gloss. in Clement. I *de Privil.* verb. *parochialis*, Abb. in cap. *Omnis utriusque sexus*, *de Pœnit. et Remiss.*, ubi de communi testatur) et alias generaliter consulta an proprius parochus quis dicatur, in cujus parochia contrahentes habitant tempore quo matrimonium contrahitur, respondit, ita dici. (The date of this decision is 17th of May, 1600).

"N. 37. Atque ad exemplum decisionis editæ in dicta causa Senensi alias censuit valere matrimonium scholaris, qui Patavii quinque vel sex menses moratus, timens impedimentum a parentibus, ibi duxit mulierem plebeiam coram parochi loci et testibus" (ap. Ballerini-Palmieri, n. 1191).

Father P. de Langogne (*Votum cit.*, *Acta S. Sedis*, vol. 38, p. 251) thus comments on these decisions: "Tenuitati meæ maxime persuasum est apparentes in his aliisque Resolutionibus, tum ante tum post incœptam (1718) *Thesauri* compilationem, oscitantias ac dubietates perbelle componi posse si quis attente perpendat, in unaquaque factispecie, genuinam decidendi rationem. Hæc autem ratio decidendi non præcise desumebatur e Juristarum placitis et conclusionibus, haud parum nutantibus et variis,

from the parish long enough to contract an impediment, unless the freedom (*status liber*) of the contracting parties is proved *ad tramitem juris; c*) given these two conditions, that anyone can marry in the presence of the local Ordinary, or *the parish-priest* (*whoever he may be*) and two or three witnesses, *as the Council of Trent ordains* — "*coram Ordinario loci, aut parocho (quicumque sit) et duobus vel tribus testibus, come stabilisce il Tridentino*" (*Acta S. Sedis,* vol. 40, p. 531). The S. Congregation of the Council, therefore, to which is committed the

---

ut supra delibatum est, neque ex longiori breviorive commoratione, neque etiam ex fraudulento vel non fraudulento discessu respectu parochi domicilii, nec etiam ex sacramentis necessariis vel voluntariis, neque tandem ex notione quasi-domicilii nondum satis fixa neque competenter declarata; sed ex concretis subjectæ causæ conditionibus et adjunctis, quæ, si revelabant intentionem contrahendi sine parocho et testibus, invaliditatem matrimonii, secus vero validitatem satis demonstrabant."

And *ibid.,* vol. 39, p. 315-6, he returns to the same point: "Huc faciunt, ni fallor, perantiquæ factispecies supramemoratæ, v. g. juvenis Senensis, et juvenis Patavini, quorum matrimonium hæc S. Congregatio declaravit validum. Canonistæ suas hac de re nectunt explicationes satis extortas (salva reverentia dixerim) et commentaria satis cerebrosa; sed planiorem et forte veriorem omittunt exegesim, videlicet: S. Congregatio dicta matrimonia declaravit valida, quia noluit, nonobstantibus Juristarum placitis et oscitantiis de domicilio vel quasi-domicilio nondum receptis in foro, clandestina sententiare matrimonia quæ, juxta mentem et litteram Tridentini, coram parocho duobusque testibus rite celebrata fuerant."

For further study of this point, may be consulted Sanchez, op. cit., lib. III, disp. 23, n. 12; and Ballerini-Palmieri, n. 1191.

special office and duty of interpreting the decrees of the Council of Trent in the name of the Holy See, understands the words of the decree *Tametsi* "præsente parocho" as meaning "coram Ordinario loci aut parocho, quicumque sit," i. e. before the local Ordinary or the local parish-priest, whether he be the parish-priest of the contracting parties or not.

Of the two Consultors who wrote their *Vota* in response to the instructions of the S. Congregation, one, Mgr. Sili, held the view that the Council of Trent did not intend the *parochus proprius* to be necessary for the validity of marriage. The other, Prof. Lombardi, believed that it did. But both testify to the opinion of the S. Congregation. Mgr. Sili, in his *Votum*, writes: "Tempus jam erat ut peculiaribus indultis et variis, quæ nonnisi partim proficiunt, generalis et uniformis reformatio sufficeretur: hanc autem reformationem, Vos, Emi Patres, consultissime judicastis commode fieri posse, non tam aliquid de novo inducendo, quam revocando legem Tridentinam ad suam pristinam et genuinam significationem.

"Est enim mens Vestra ut sartum maneat parocho vel Ordinario proprio jus (cui respondeat ex parte sponsorum obligatio), per se vel per alium sacerdotem, benedicendi nuptias suorum subditorum, prout expresse cavetur in decreto *Tametsi*...

"At si contingat nuptias celebrari coram alio quovis parocho vel Ordinario, aut coram sacerdote ab eis delegato, cum S. Synodus in ea parte decreti, quæ continet legem irritantem, non distinguat inter parochum et Ordinarium proprium et parochum et Ordinarium non proprium, recte Vos adhæretis re-

gulae: *ubi lex non distinguit, nec nos distinguere debemus* (*Ex Cap. 6, de major. et obed.*, § 6); eo amplius quod distinctio in casu valde esset odiosa. Atque ideo merito decernendum arbitramini eas nuptias, fore quidem, illicitas sed validas; quin et licitas, si justa et gravis causa intercedat."

And Prof. Lombardi says: "Licet in decreto comitiorum generalium 20 Maii 1905, saltem ut mihi transmissum fuit, ita edicatur: 'che si chieda il voto di uno o due Canonisti, onde preparare un decreto che riporti la legislazione matrimoniale circa l'assistenza del parroco nei matrimonii al disposto del Tridentino *pure et simpliciter* (that the opinion of one or two Canonists be asked, as a preparation for a decree which will restore the matrimonial legislation touching the assistance of parish-priest at marriages to the enactment of Trent purely and simply)'..... Mihi constat non deesse in amplissimo S. Vestro Consessu, qui contendat Concilium intellexisse parochum quemlibet, theoriam autem et disciplinam de parocho proprio fuisse operam jurisprudentiae" (*Acta S. Sedis*, vol. 40, pp. 536, 545).

I will conclude this discussion by answering an objection which will probably have occurred to some of my readers. "You object," it may be said, "to the qualification of the word '*parocho*' in the phrase of the decree *Tametsi* '*præsente parocho*' by the addition of the restrictive term '*proprio;*' and yet you yourself are obliged to limit the extension of the term *parocho*, by interpreting it in the sense of the *local* parish-priest. Your real conclusion from which you seem to shrink, should be that *any* parish-priest can *anywhere* in the world validly marry any couple who present themselves

before him." Thus Father Wernz (*Vot. cit.*, p. 398) writes: "Si verbum illud "*proprio*" non esset addendum, logice sequeretur, propter illam indefinitam locutionem "*parocho,*" *unumquemque verum parochum* posse assistere matrimoniis fidelium."

Resp. It is true that according to the intention of the Council of Trent and according to the text of its decree, any parish-priest could marry any couple; but only in that place where he holds the office of parish-priest, in his own territory, not elsewhere. For only in his parish is a priest *parochus formaliter qua talis:* when he is elsewhere, he is called by courtesy a parish-priest, but it is understood that he is parish-priest only of that one place over which he has jurisdiction. He is not a parish-priest in the formal sense of the term all the world over. The primary and fundamental relation of the parish-priest is to his parish, and from this relation all others arise. If he can, according to the discipline now about to be superseded, assist at the marriages of his own parishioners, or if he can absolve them, outside the territory of his jurisdiction (supposing that he is a *parochus* in the strictly canonical sense of the term, and not in the wide sense of art. II. of the decree *Ne Temere*), it is only because he possesses personal jurisdiction over them by reason of his territorial jurisdiction over their place of domicile.

Hence, in order to act as parish-priest, he must be in the position of parish-priest *formaliter qua talis*, i, e. within his parochial jurisdiction. Consequently, when the term *parochus* is used absolutely and without qualification, it is understood that the *local* parish-priest is being referred to: just as,

when we speak of the *parochus proprius* simply and absolutely, we mean the parish-priest of domicile, not of origin ("Si simpliciter in jure nominetur parochus proprius, intelligitur parochus domicilii:" Fr. Wernz, *Vot. cit.*, p. 399).

Father Wernz's objection therefore may be thus answered in scholastic form: "Unumquemque verum parochum in suo proprio territorio, *Concedo;* ubicumque terrarum, *Nego.*"

This reply is confirmed by the S. Congregation of the Council, which, as we have just seen, instructed its Consultors to draught a decree by which the discipline contemplated by the Council of Trent should be restored, viz. "that anyone can marry in the presence of the local Ordinary or *the parish-priest* (*whoever he may be*), as the Council of Trent ordains." This point was maintained as fundamental throughout the discussions of the S. Congregation (see *Acta S. Sedis*, vol. 40, p. 567); and the S. Congregation did not consider that it was acting inconsistently when it limited the power of the parish-priest to assist at marriage to his own territory (See *Schema Canonum*, Can. 1, § 2, *ibid.*, p. 568; and the Decree in its final form).

The Tridentine decree *Tametsi* may therefore be paraphrased as follows: In order to put a stop to clandestine marriages, the Council decrees 1) that the banns of marriage be published by the *parochus proprius* of the contracting parties: this, however, is not essential to the validity of the Sacrament, and in case of necessity may be dispensed with; but at least 2) the marriage must take place before *a* parish-priest (of course, in his own parish) and two witnesses; and any marriage that is celebrated

otherwise than in the presence of *a* parish-priest or his delegate and two witnesses, is null and void, wherever this decree has been promulgated. 3) But the *parochus proprius* of the contracting parties is the proper person to solemnize and bless the marriage, and therefore to be licitly celebrated, the marriage should take place before *him;* and any other priest who usurps his rights in this matter is severely punished.

The Council of Trent, then, deliberately and of set purpose omitted the word *proprio* after *parocho* in the invalidating clause of the decree *Tametsi*, and intended that all marriages celebrated in the presence of any parish-priest in his parish and two witnesses should be held to be valid as far as the impediment of clandestinity was concerned.

*
* *

The Post-Tridentine Discipline.

If this view of the intention of the Council of Trent is correct, a remarkable situation is revealed. On the one hand, the Tridentine legislation required the presence of the local parish-priest for the validity of marriage; on the other the post-Tridentine discipline has for more than three centuries insisted on the necessity of the presence of the *parochus contrahentium proprius*. Are we then to believe that the modern jurisprudence has been wrong for all these years? Or is it not more reasonable to argue that, after all, if ever since the Council of Trent the canon law has maintained the necessity of the *pa-*

rochus proprius, this must have been what the Council intended?

The answer to both questions is in the negative. A disciplinary law of the Church is not immutable. The same supreme power that made the law can abrogate or modify it. Nor is it necessary that the change be effected by means of a special, formal act of legislation. Jurisprudence is as a rule the result of a slow and gradual process of development. It originates in the views and conclusions of individual jurists, which gather strength in proportion as the number and authority of the doctors who share them increase, until they become common and solidly probable opinions, which, when they have reached this stage, may in many cases be safely acted upon in practice, but which always fall short of absolute stability and certainty until they have received the confirmation of the competent authority, whether by formal publication as the law of the Church henceforward, or by their being given authentically as the guiding principle and norm to be followed in practice. Thus it was with the canonical discipline regarding the *parochus proprius*. It began in private opinions, which gradually gained ground till they became the current jurisprudence, and were ultimately consecrated by the authentic declarations of the Holy See (Urban VIII, Const. *Exponi*, 14 Aug. 1627; Benedict XIV, Const. *Paucis abhinc hebdomadis*, 19 Mar. 1758). We shall find this process actually at work within the post-Tridentine matrimonial discipline even down to our own time, for it was not till the year 1867 that the practical rule was authentically given, determining the conditions necessary for the acquisition of the

rights of parochiality. And no sooner had this rule been established than the process of disintegration set in, so that the conditions prescribed were relaxed first in one, then in another locality, and the relaxation gradually became more wide-spread and more intensified, until finally the Holy See, by its Decree *Ne Temere*, has abrogated the whole of the discipline of the *parochus proprius*, domicile and quasi-domicile, as far as it affects the validity of marriage, and has established a new jurisprudence, or rather, has returned to the jurisprudence of the Council of Trent.

It is not legitimate, therefore, to argue back from the discipline of the present day in order to discover what was the meaning and intention of the Council of Trent. It is begging the question to assume that there has been no change of discipline since Trent. Nor is there any profanation in the suggestion that such a change has actually taken place. It only means that the Church has exercised her lawful authority in a matter that was within her competence, and that by that exercise of authority the discipline decreed by Trent became obsolete.

It is true that doctors were in error as to the interpretation of the Tridentine decree, and that their error was the occasion of the origin of the new jurisprudence of the *parochus proprius*. But a clear distinction must be drawn between the speculative question of the interpretation of the decree *Tametsi*, and the very practical matter of the canonical jurisprudence regulating the validity of matrimony in actual life. The former the Church never undertook to decide (indeed, the most formal declaration we have on this point is that of the

S. Congregation of the Council, 20th of May, 1905, which says "il matrimonio *coram... parocho, quicumque sit,...* come stabilisce il Tridentino," thus openly taking sides against the interpretation favouring the *parochus proprius*), but she sanctioned the discipline requiring the presence of the *parochus proprius* for the validity of marriage, and established it as the ecclesiastical law wherever the decree *Tametsi* was promulgated. The Church has the power to do this, and when she acts, "whatever is, is right."

One more question,—it is the last,—arises about the misinterpretation of the decree *Tametsi*.—How could such a mistake be made? Is there any excuse for it?—Sufficient excuse may be found in the actual wording of the decree. "Sane," says Father Pius de Langogne (*Vot. cit.*, *Acta S. Sedis*, vol. 39, p. 313), "perfacile fuit et pronum ut parochus secundæ partis Decreti (which is the invalidating clause) ille ipse subaudiretur qui dicitur in prima parte (which treats of the proclamation of the banns) parochus proprius." Hence Father Wernz, S. J., (*Vot, cit.*, *Acta S. Sedis*, vol. 32, p. 398) argues: "Profecto Concilium Tridentinum in duobus illis membris c. Tametsi, ubi ex professo agit de *forma substantiali* ipsius *celebrationis* matrimonii (non de denuntiationibus et de benedictione matrimonii) verbum illud: 'proprio' vocibus 'Saltem Parocho' vel 'Præsente Parocho' non addit, atque huic omissioni defensor vinculi hujus S. Congregationis in suis animadversionibus magnam vim videtur tribuere. At indubitanter verbum: '*Proprio*' etiam in locis citatis est omnino subintelligendum. Cfr. Sanchez, *l. c. l. III, cap. 19, n. 2.* Nam Patres Concilii Tri-

dentini tum in *præcedentibus* (de denuntiationibus matrimonialibus) tum in *subsequentibus* (de benedictione matrimonii) expresse loquuntur de parocho proprio, sed ex toto contextu semper agitur *de eodem* parocho; hinc etiam in parte media capitis Tametsi verba Concilii Tridentini intelligenda sunt de parocho proprio." Similarly Professor Lombardi (*Vot. cit.*, *Acta S. Sedis*, vol. 40, p. 545, note 2): "Proponitur constituendum: 'Quemlibet parochum esse idoneum ad consensum quorumlibet nupturientium, licet non suorum subditorum, excipiendum.' Quod profecto est alienum a mente Tridentini, quod constanter loquitur *de parocho seu de parocho suo.* Nam parochus *contrahentium proprius* memoratur, ubi est sermo de bannis, necnon ubi est sermo de benedictione sponsi tribuenda. Nec dicas dici simpliciter *parochum* quando est sermo de assistentia (*aliter quam præsente parocho*), nam hæc verba intelligenda sunt juxta contextum capitis loquentis evidenter de *parocho proprio.*"

This argument has been already sufficiently refuted: and it is reproduced here only to show what ground jurists had for their misinterpretation of the law. But as I have quoted the two *Vota* of Father Wernz and Professor Lombardi, it will not be out of place to see what Father P. de Langogne and Mgr. Sili have to say in their *Vota* on the other side of this question. Fr. P. de Langogne, therefore proceeds (*loc. cit. supra*). "Nihilo tamen minus, cuique rem funditus persolventi, sensum facessit quod parochus proprius expresse nominetur ubi simpliciter commemoratur lex proclamationum jamdudum vigens et matrimoniorum validitatem nullatenus attingens; dum e contra solummodo *parochus* sine

addito, sine qualificativo *proprius*, nominatur ubi lex edicitur absolute nova, terque quaterque solemnibus Sessionibus (præter multiplicissimas congregationes particulares) discussa, gravissimumque contra validitatem inducens impedimentum nunquam antea in Ecclesia Dei auditum," In like manner Mgr. Sili (*Vot. cit.*, *Acta S. Sedis*, vol. 40, p. 535) writes:—"Quamvis in contextu dicti capitis, ante et post illa verba ("aliter quam praesente parocho vel alio sacerdote de ipsius parochi vel Ordinarii licentia, etc."), expresse loquantur de parocho *proprio* qui debeat denuntiationes facere et nupturientibus benedictionem impertire, non tamen inde sequitur etiam eadem verba de parocho *proprio* esse accipienda: imo contrarium prorsus infertur. Si enim Tridentini Patres, cum ageretur de denuntiationibus faciendis deque benedictione nuptiali, quæ solummodo ad liceitatem requiruntur, expressam voluerunt qualitatem parochi *proprii*, eo magis id efficere debuissent cum determinarent formam matrimonii substantialem, qua in re ob gravissimos effectus legis irritantis, perspicuitas verborum maxime curanda erat. Cum itaque ibi mentio fiat dumtaxat de parocho vel Ordinario, absque ullo addito, dicendum est qualitatem parochi *proprii* juxta mentem S. Synodi non esse ad validitatem necessariam. Scilicet obtinet in casu regula interpretationis: *Legislator quod voluit expressit, quod noluit tacuit* (*Ex cap. 12, de Decim.*)." In short, a legal document of such importance and drawn up with such precision, must be interpreted according to what it says, not according to what it does not say.

But I think that another contributory cause of the error of interpretation may be suggested. Pope

Benedict XIV, *De Synodo Diocesana, l. 8, c. 12, n. 2,* tells us that: "Absoluto, atque ab Apostolica Sede confirmato Concilio Tridentino, quamplurimi Episcopi suas coegerunt Synodos in quibus prædicti decreti promulgationem, uti par erat, urgentes, per singulas Parochias, populo denuntiari jusserunt, firmitate caritura quælibet conjugia in posterum contrahenda, nisi fuerint celebrata *coram legitimo Ministro.*" Now the word *legitimus* is in itself an ambiguous term. It may, like our English equivalent, *legitimate*, and like *legal*, mean either *valid* or *licit* according to the context in which it is used: and in this particular context, where it is said that "*firmitate caritura* quælibet conjugia in posterum contrahenda, nisi fuerint celebrata *coram legitimo Ministro,*" *legitimo* certainly means *valid.* Thus, Benedict XIV continues (his purpose is to explain the use of the word *Ministro,* not of *legitimo*, but in explaining the one, he necessarily explains the other): "Equidem nobis persuasum est, hanc unam ob causam ab hisce Synodis Parochum appellari legitimum matrimonii Ministrum, quia scilicet ipse est publicus Minister, cui soli Ecclesia auctoritatem tribuit sua præsentia roborandi matrimonii contractum, eique vires et firmitatem adjiciendi."

But unless very detailed explanations were entered into, and clear distinctions made, the misunderstanding of the word *legitimo* in the sense of *licit* was practically unavoidable. For, first, this is the more natural and more proper meaning of the word; but above all, the decree *Tametsi*, immediately after invalidating marriages contracted "aliter quam præsente parocho," declared emphatically that the *parochus proprius* was the only one who might *licitly*

assist at and bless the marriage,—it was the *parochus proprius* "qui matrimonio interesse debebat et a quo benedictio suscipienda erat." Nor was this anything new to the faithful. For marriage *in facie Ecclesiæ* had always been a matter of precept, and many provincial and diocesan Synods had, long before the Council of Trent, made the presence of the *parochus proprius* obligatory (Cfr. Wernz, *Jus Matrimoniale, n. 157*). He therefore was the only "legitimus Minister" of Matrimony in the eyes of the faithful up to the time of the Council of Trent, even though his presence was not necessary for the validity of the Sacrament. Consequently, when it was announced, after the close of the Council, that marriages would henceforth be invalid unless contracted "*coram legitimo Ministro*," it was natural to infer that the *parochus proprius* was the legitimate minister alluded to, no distinction being made between his licit and his valid assistance; and so it came to pass that the presence of the *parochus proprius* was considered necessary for the valid celebration of matrimony.

We have now to deal with a fact, about the existence of which at any rate there can be no dispute, namely, the canonical discipline of matrimony after the close of the Council of Trent. The great outstanding feature of this discipline has been the necessity of the presence of the *parochus proprius* for the validity of all marriages between Catholics wherever the decree *Tametsi* has been promulgated. (It is understood that whenever the *parochus* is referred to as the necessary *testis auctorizabilis* of marriage, the term *parochus* comprises both the Ordinary and the delegate.) Who then

is the *parochus proprius?* He is the parish-priest of one or other of the contracting parties. In other words, one or other of the contracting parties must be his parishioner. Hence the *parochus proprius* is not the parish-priest of the place of *origin* or *birth*, but the parish-priest of the place of *residence* or *domicile* of one of the parties to the marriage. By *domicile* is meant the place of perpetual residence. The idea is composed of two essential elements, the *fact* of actual residence in a place (or parish), and the *intention* of living in that place always, unless something occurs that requires a change of residence. "Domicilium habitationis verum in ordine ad matrimonium est *habitatio actualis* in aliquo loco, i. e. in parochia, cum *intentione* ibidem *perpetuo* manendi, nisi causa quædam alio avocet" (Wernz, op. cit., n. 177). The domicile of a wife is that of her husband, of children not yet emancipated that of their parents, of a ward that of his guardian.

The first great landmark in the history of the post-Tridentine matrimonial discipline is the official sanction and confirmation of the necessity of the presence of the *parochus* of domicile for the validity of marriage, given by the Brief of Urban VIII *Exponi Nobis*, 14th of August, 1627. The Archbishop of Cologne had proposed the following questions to the S. Congregation of the Council for solution: "Quæritur humiliter a S. C., 1° an incolæ tam masculi quam feminæ loci in quo Concilium Tridentinum in puncto matrimonii est promulgatum et acceptatum, transeuntes per locum in quo dictum Concilium non est promulgatum, retinentes idem domicilium, valide possint in isto loco matrimonium sine parocho et

testibus contrahere? — 2° Quid si eo prædicti incolæ tam masculi quam feminæ solo animo sine parocho et testibus contrahendi se transferant, habitationem non mutantes? — 3° Quid si iidem incolæ tam masculi quam feminæ eo transferant habitationem, illo solo animo, ut absque parocho et testibus contrahant?" The S. Congregation, on the 5th of September, 1626, replied "Ad 1^{um} et 2^{um}, non esse legitimum matrimonium inter sic se transferentes et transeuntes cum fraude. — Ad 3^{um}, nisi domicilium vere transferatur, matrimonium non esse validum." The Archbishop petitioned Pope Urban VIII for a special confirmation of this decision by Apostolic authority; and this was given as follows: "Nos... responsum, seu dubiorum prædictorum resolutionem hujusmodi, auctoritate apostolica, tenore præsentium, approbamus et confirmamus, illisque inviolabilis apostolicæ firmitatis robur adjicimus. "Decernentes, illud, seu illam, necnon præsentes litteras, valida, firma et efficacia existere et fore, suosque plenarios et integros effectus sortiri et obtinere; sicque et juxta illa, per quoscumque judices ordinarios et delegatos, etiam causarum palatii apostolici auditores, judicari ac definiri debere" (*Bullarium Romanum*, tom. 13, n. 257). It is to be observed that in this decree there is no suggestion of quasi domicile,— which is a later addition to the matrimonial discipline.

It soon became apparent, however, that it was necessary to discover some easier and simpler means of acquiring the rights of parochiality with a view to marriage. According to the law, those who wished to be married away from their own parish, and without the delegation of their Ordinary or

parish-priest, could do so only by transferring their domicile, or they might resort to what would probably be considered a still more inconvenient expedient, namely, the abandonment of a fixed abode altogether, so as to become *vagi*. They could thus take advantage of the special legislation provided for this class of persons, who could be lawfully married by the parish-priest of the place in which they were temporarily staying, or even, as many theologians hold, by any parish-priest in the world. But for those who desired to retain their domicile, and yet to be married in some other parish and by a parish-priest other than their own (and without legitimate delegation, which often could not be obtained, or was not desired), the law provided no way out of the difficulty. Canonists and theologians therefore excogitated the *quasi-domicilium*, as a means of acquiring the rights of parochiality with a view to matrimony. It must not be imagined, however, that this was made the object of special legislation, and incorporated into the canon law at once in a mature and perfect condition. It had to go through the process of development, and was gradually received into the practical jurisprudence of the Church, and confirmed by the decisions and instructions of the Holy See. — "Ecclesiam quasi-domicilii notionem mutuasse ex jure Romanorum est res usque in hodiernum diem non satis probata; *canones* vero expressi de quasi-domicilio in antiquo jure ecclesiastico omnino, non existunt, imo etiam nostra ætate expressa et universalis lex pontificia de quasi-domicilio nondum reperitur lata. Notio quasi-domicilii est potius inventum quoddam fori ecclesiastici theoriis virorum doctorum, praxi judiciali

paulatim introducta et tandem per sententias et Instructiones SS. Congregationum confirmata." (Fr. Wernz, Vot. Cit., *Acta S. Sedis*, vol. 32, pag. 378).

I do not propose to enter minutely into the history of the *quasi-domicilium* This will be found set forth with great erudition in the *Votum* of Father P. de Langogne (*Acta S. Sedis*, vol. 38, p. 245, seqq.). A short historical account of the *quasi-domicilium* is necessary, which I will summarize from the *Votum* just mentioned. Taking the authors in chronological order, I begin with Sanchez, who wrote at the end of the sixteenth century. (The edition of his work *De Sancto Matrimonii Sacramento*, now before me, was published in 1602, and the *Imprimatur* of the Provincial S. J. was given in 1599). The question Sanchez proposes to himself is: "An ad acquirendam parochiam respectu matrimonii, requiratur acquisitio domicilii, cum animo perpetuo habitandi?" He answers (Lib. III, disp., 23, n. 11-14): "Duplex est sententia in proposita quæstione. Prima ait, ut vere aliquis dicatur parochianus, exigi animum constituendi ibi domicilium, quare si habet domicilium in uno loco, transferatque se in alium, non animo permanendi, sed ex causa limitata, ad tempus, qua finita, rediturus est ad proprium, non censeri illius loci, in quo ad tempus adest, parochianum, sed loci domicilii permanentis...

"Secunda sententia docet acquiri parochiam ratione habitationis, quando ea brevis temporis non est, sed in id oppidum se aliquis recipit causa alicujus negotii expediendi, ut eo expedito ad proprium domicilium redeat. Ut acquirunt scholastici in loco studii, famuli et mercenarii non ad breve tempus locantes operas, in domo heri, et ii qui causa pestis

aut belli aliquò confugiunt. Probatur primo, quia is est proprius parochus ad conjungendum aliquos matrimonio; qui in *c. omnis, de pœnitentiis et remis.* appellatur proprius sacerdos ad audiendas confessiones: ... Sed ibi appellatur talis, habens curam parochiæ, in qua aliquis per majorem anni partem habitat... Ad idem sunt Innocen., etc., ubi aiunt ibi dici proprium sacerdotem scholasticorum, et mercenariorum, illum in cujus parochia per anni spatium habitant: ergo similiter is erit proprius parochus pro matrimonio, nec ad id requiritur animus perpetuo habitandi... Confirmatur, quia ex sola habitatione alicubi, non per modum viatoris, sed conducta domo, vel officina, contrahitur quasi domicilium, ita ut hic possit conveniri... Ergo similiter acquiretur quasi domicilium in rebus spiritualibus, ut ratione illius, parochus habeat jurisdictionem in sic habitantem. Quare hanc sententiam tenent expresse Federi. de Senis,... ubi dicunt, non esse arguendum de jure parochiæ ad jus domicilii; quia ad jus parochiæ consideratur præsens status, id est, habitatio præsens, unde si propter bellum ad aliam parochiam quis se transtulit animo redeundi ad primam, bello cessante, non erit sua Ecclesia parochialis, illa dimissa, sed quam tunc inhabitat: et idem dicunt de mercenario et famulo in aliena parochia ministranti. Unde concludunt illum dici parochianum, qui habitat in parochia *animo manendi*, licet non animo domicilium constituendi, secus quando causa recreationis... Unde dicunt esse parochianum loci belli verisimiliter duraturi, quia tunc accedit *animo commorandi*, secus si per transitum exercitus transeuntis se ad civitatem contulisset... Fugientem ob pestem causa habitandi ad aliquod tempus, dici statim

parochianum: secus si non causa habitandi, sed ut uno aut altero die ibi sit... Idem Gabrie... ubi ait, scholares et mercatores dum per aliquod tempus notabile moram faciunt in aliqua parochia, ibi habere suum proprium sacerdotem, et notabilem moram esse majorem anni partem...

"Sit conclusio, quamvis prior sententia sit *probabilissima;* at posterior mihi arridet tamquam verior. Durum enim mihi videtur ut scholastici et alii qui majori anni parte, imo et multis annis in aliqua diœcesi habitant, non possint ibi matrimonio conjungi... et ita credo ad omnia dempto ordinis sacramento, effici aliquem parochianum, et subditum alicujus diœcesis, quando majori anni parte ibi inhabitat...

"Hinc infertur primo, non opus esse expectare ut majori anni parte hi in parochia aut diœcesi habitarint, sed statim ac animum habitandi majori anni parte habentes, incipiunt habitare, effici parochianos, et posse omnia dicta erga illos exerceri. Sicut enim ad domicilium, nullius temporis habitatio requiritur, sed statim ac quis incipit habitare, cum animo perpetuo habitandi, illud acquirit: ...sic statim ac quis incipit habitare animum habens habitandi toto tempore requisito, efficitur parochianus."

I have made this long quotation from Sanchez, because it is interesting to find that his view with regard to the *quasi-domicilium* is in full agreement with the general teaching of modern times, and especially with the Instruction of the Holy Office, 7th. of June, 1867, which will be referred to later. He holds that parochial rights are acquired by actual residence in a parish with the intention of residing there at least for the greater part of a year;

and that, given this intention, those rights are acquired and can lawfully be exercised from the first moment of the actual residence.

But though he takes this view, he is obliged to confess that the opposite opinion is *probabilissima*, namely, that no one who retains a domicile in one parish can acquire the rights of parochiality in another. This shows that practical jurisprudence had not yet adopted the expedient of the quasi-domicile.

This passage from Sanchez enables me to make a correction with reference to the question of the period when the *term* « quasi-domicilium » was introduced. Feije (*De Dispens. Matrim.*, n. 209, edit. 4, pag. 130—apud *Vot.* P. de Langogne, loc. cit. p. 247) says: "vox *quasi-domicilium* non occurrit apud antiquiores auctores: voce habitationis hi uti solebant". Father P. de Langogne (loc. cit.) modifies this statement by showing that the word is used by Laymann (1635), Pirhing (1679), Reiffenstuel (1703) and others of the period. But he adds: "Nihilo tamen minus, sensum facessit quod quamplures optimæ notæ Theologi et Canonistæ quasi-domicilium mentionem non fecerint, etsi de jure parochialitatis adipiscendo prolixe disseruerint, ut v. g. juxta ordinem antiquioritatis Sanchez, etc." But in the passage quoted above, Sanchez twice uses the term *quasi-domicilium*, and it appears again a third time later in the same n. 12, where he says: "Ad idem sunt expresse alii Doctores sentientes posse episcopum dispensare in votis scholasticorum, ibi ad tempus residentium: non enim posset, si ratione habitationis non acquirerent *quasi domicilium*, et efficeretur is episcopus proprius illorum pastor". There can be no doubt, therefore, that Sanchez

knew and used the term *quasi domicilium*, and that before the close of the sixteenth century, in the same sense as it is used to-day. But the evidence does prove that neither the term nor the doctrine of quasi-domicile was in the common acceptance of canonists at that period and for a considerable length of time subsequently. Father Wernz (Vot. cit., p. 379): "Nova illa terminologia de 'quasi-domicilio' sæculo decimo quarto primum videtur reperiri (but he gives no proof of this statement), atque tandem *ex ultimo sæculo* est universaliter et constanter in foro ecclesiastico et inter scriptores recepta".

Cardinal Tusco (1620) and other writers of that time held that parochiality could not be acquired in a second parish, unless the intention was formed of abandoning the domicile in the first parish. Then in 1627 came the decisions of the S. Congregation of the Council, confirmed by the Brief of Urban VIII, *Exponi Nobis*, which required the actual transference of domicile for the acquisition of the rights of parochiality sufficiently for the validity of matrimony.

Still, the doctrine of the *quasi-domicilium* continued to gain ground. Reiffenstuel (1703) says: "Sicut ad acquirendum verum domicilium sufficit unius diei habitatio cum animo ibidem constanter permanendi, ita etiam ad acquirendum quasi-domicilium sufficit una aut altera dies cum animo ibidem habitandi per majorem anni partem... Ratio est quia non apparet, cur quis possit acquirere verum domicilium per unum diem cum animo ibidem perpetuo manendi, et non quasi-domicilium per unum diem cum animo per majorem saltem anni partem ibidem manendi, quod temporis spatium pro quasi-domicilio requiritur (lib. IV Decr., tit. 3, n. 60).

In 1758 we find the first explicit reference made by the Holy See to the *quasi-domicilium*, in the famous letter of Benedict XIV, *Paucis abhinc hebdomadis,* to the Archbishop of Goa.—"...Novum non est, neque inusitatum, quod quis domicilium habeat aliquo in loco, et quasi-domicilium adipiscatur in alio: in quo rerum statu si versetur, tunc eidem liberum erit, matrimonium contrahere coram illo parocho, intra cujus paroeciæ fines tunc inhabitat cum matrimonio jungitur, juxta communem sententiam a Nobis relatam sancitamque in superius memorata Institutione Nostra ecclesiastica 33 latinæ editionis. (With regard to this *Institutio* 33, Father P. de Langogne says that in it Benedict XIV " tradit regulam non generalem sed potius, ita si dici possit, classificativam, id est varias distinguit advenarum classes, vagorum, studentium, carceratorum, relegatorum, infirmantium in xenodochiis, puellarum expositarum educandarum in monasteriis, famularumque, et conditiones prœfinit quibus *in dioecesi sua Bononiensi* dictae classes nupturientium parochialitatem vel secus adipiscuntur".)...

" Post hæc necessarium fore censemus nonnihil adjungere, ut in propatulo sit quidnam requiratur ad *quasi-domicilium* adipiscendum. Verum hac in re non alio pacto responderi potest, nisi quod, antequam matrimonium contrahatur, spatium saltem unius mensis ille qui contrahit, habitaverit in loco ubi matrimonium celebratur". Thus Benedict XIV approved the principle of the *quasi-domicilium;* but many have thought that he meant that a month's residence in a parish was sufficient for the acquisition of a quasi-domicile. This was not what he intended to express, but rather that a month's re-

sidence in a parish before marriage, and perhaps also for a short time after the marriage, was required in order to afford sufficient presumption that there was no intention of evading the law and of contracting marriage fraudulently, or at least that any such fraud had been purged (1). In his *Quæstion. Canonic. et Moral.* (q. 182) Benedict XIV lays down the commonly accepted doctrine: "Domicilium non acquiritur sine animo perpetuo habitandi: nec quasi-domicilium acquiritur, nisi concurrat animus habitandi per majorem anni partem".

At any rate, Benedict XIV authoritatively settled nothing as to the doctrine of *quasi-domicilium;* in fact it became rather more complicated, and the controversy more intricate. "Qua in notione quasi-domicilii theologi et canonistae in quinque diversas sententias abierunt, donec tandem nostra ætate rejecta jampridem laxa Pontii sententia de nimis brevi commemoratione, reprobata quoque vel potius melius explicata opinione de sufficientia unius mensis vel notabilis anni partis vel sex mensium, tandem adoptata fuerit sententia supra exposita de commoratione in parochia cum intentione habitandi per majorem anni partem" (P. Wernz, *Vot. Cit.*, p. 379). "Pergratum utique foret sive in Decretalibus sive Tridentino aut etiam in consensione Doctorum, vel saltem in præstabilitis juris Regulis et practica jurisprudentia, quoddam detegere caput decisionemve auctoritatem, qua tute ac generaliter satis firmarentur tum notio tum conditiones quasi-domicilii:

---

(1) In other words, in order to afford presumption of the intention to establish a domicile or quasi-domicile in the parish (Ballerini-Palmieri, op. cit., n. 1192).

sed nulla, ni fallor, hujusmodi decisio reperitur usque ad annum 1867, tribus proinde sæculis post decretum *Tametsi* jam elapsis." (P. de Langogne, Vot. cit., p. 253).

The decision just alluded to is the *Instruction* of the Holy Office to the Bishops of England and the United States of America on the *Quasi-domicile,* dated 7th of June 1867. — "Ad constituendum quasi-domicilium,... duo simul requiruntur: habitatio nempe in eo loco ubi matrimonium contrahitur, atque animus ibidem permanendi per majorem anni partem: quapropter si legitime constet vel ambos vel alterutrum ex sponsis animum habere permanendi per majorem anni partem, ex eo primum die quo duo hæc simul concurrunt, nimirum et hujusmodi animus et actualis habitatio, judicandum est quasi domicilium acquisitum fuisse, et matrimonium quod proinde contrahatur esse validum. Verumtamen si de prædicto animo non constet, ad indicia recurrendum est quæ præsto sint, quæque moralem certitudinem pariant. In re autem occulta et interna difficile est hujusmodi indicia habere, quæ judicem securum faciant: inde est quod adhiberi maxime debet regula a Summo Pontifice Benedicto XIV confirmata, ut inspiciatur utrum ante matrimonium, spatio saltem unius mensis vel ambo vel alteruter in matrimonii loco habitaverint. Quod si factum fuisse deprehendatur, censendum est ex præsumptione juris intentionem permanendi per majorem anni partem extitisse, et domicilium fuisse acquisitum proindeque matrimonium esse validum. At si præsumptio hæc juris, quæ ex menstrua habitatione oritur, contrariis elidatur probationibus, quibus certo ac liquido constet prædictum animum nullo

modo extitisse, tunc profecto contrarium proferri debera judicium manifestum est, quia præsumptio cedere debet veritati. Præterea manifestum quoque est actualem habitationem ineptam esse ad quasi-domicilium pariendum, si quis in ea regione more vagi ac itinerantis commoretur, non autem vere proprieque habitantis, quemadmodum scilicet cœteri solent, qui in eodem loco verum proprieque dictum domicilium habent." (Appendix to the Provincial Councils of Westminster, Document VIII). The common teaching on the conditions necessary for the acquisition of a canonically valid *quasi-domicilium* was thus officially sanctioned and made a rule of practical jurisprudence (1).

Father Wernz (*Vot. cit.*, p. 378-9) writes of this Instruction: "Qua declaratione S. C. Inquisitionis doctrinam jam antea inter scriptores magis receptam expresse ratum habuit... Doctrina canonica in Instr. S. Congr. Inq. proposita... habetur nunc tamquam absolute certa, non tantum in theoria, sed quod majoris momenti est, etiam *in praxi.* Nam secundum hanc doctrinam non tantum matrimonia declarantur nulla, sed declaratione nullitatis facta etiam nova matrimonia indubitanter permittuntur. Id quod fieri non posset, nisi doctrina ista esset omnino certa; secus SS. CC. sese manifesto exponerent periculo violandi jus divinum de impedimento ligaminis constitutum."

On this Father P. de Langogne comments as follows: "*Habetur nunc*, ait præclarus Consultor,

---

(1) This Instruction also gives the true interpretation of Benedict XIV's teaching on the point of residence for a month and the quasi-domicile.

tamquam absolute certa; et quidem meo humili sensu, certa tali certitudine quæ omnem tollat exegesibus aut sententiis vere adversis probabilitatem. Instructiones Sacrarum Congregationum nequaquam haberi possunt tamquam opinationes, sed tamquam decretoriæ decisiones quibus jus ipsummet constituitur vel authentice declaratur. Opinationibus et oscitantiis anteactorum sæculorum finem, etsi partialiter tantum, apposuit Instructio supralaudata, non per modum simplicis decisionis ad casum, nec etiam per modum meræ confirmationis jurisprudentiæ vigentis, sed potius per modum normæ generalis quæ tamquam caput juris in themate retineri debet... Instructionem præcipitatem S. C. Inquis. retinendam censeo, non tanquam legem proprie dictam et formiter edictam, bene vero tanquam normam vere directivam, in qua scilicet notio quasi-domicilii traditur authentica, cuique proinde in jure vim legis, saltem secundum quid, agnoscere debemus.

"Quod autem, in mente S. Inquisitionis, hæc Instructio sit habenda tanquam norma seu regula practica, plane liquet, ni fallor, ex altera posteriori ejusdem Supremæ (2 Maii 1877, Collect. S. C. de Prop. Fide, n. 1049) responsione ad postulata Synodi Mainutinæ (Maynooth) in Hibernia circa parochum proprium, videlicet: "Parochum proprium habendum esse parochum domicilii vel quasi-domicilii contrahentium, Ad dignoscendum vero quasi-domicilium, *attendendam esse regulam traditam* in Instr. fer. IV, diei 7 Junii 1867." (*Vot. cit.*, p. 255).

The quasi-domicile may therefore be defined, in accordance with this Instruction of the Holy Office, "habitatio in loco cum animo ibi permanendi per majorem anni partem." But, as Father P. de

Langogne shows, the Instruction has by no means put an end to all discussion or diversity of opinion on the subject. He writes: "Hæc definitio inquantum includit utrumque simul elementum, id est *factum* et *animum* commorandi, satis communiter admittitur, haud exclusis illis et non paucis Theologis et Canonistis, qui hodiedum dubia movent tum circa interpretationem facti, tum et maxime circa majorem anni partem. Item eadem definitio de plano currit sub aspectu *negativo*, quatenus scilicet vi clausulæ *per majorem anni partem*, tum domicilium proprie dictum, tum perfunctoriam aut casualem commorationem excludit. Si vero consideretur sub aspectu *positivo*, id est in suis elementis intrinsecis, tantum abest ut hæc definitio plene perspicua sit et indiscussa, quod e contra cuique paulo penitius intuenti, difficultates hinc inde prosiliunt et dubietates" (*Vot. cit.*, n. 16).

It is unnecessary, however, to follow this discussion through all its details. But what it is important to point out is that it was not long before the Holy See began to derogate from the law of the quasi-domicile. Indeed it would seem that, even previously to the year 1867, in which the Instruction of the Holy Office was issued, the conditions for acquiring a quasi-domicile in England had been made exceptionally easy. For D'Annibale (III, numero 457, note 38) mentions that in England residence of only fifteen days was required for the quasi-domicile (*Ex Audientia Sanctissimi*, 22 Apr., 1858). Zitelli also refers to this concession (*Apparatus Juris Ecclesiastici*, p. 388, note). However, I have never heard that it was acted upon in England, and, in the supposition that it was authentic,

it was certainly revoked by the Instruction of the Holy Office quoted above, which was addressed to the Bishops of England and the United States.

But the Third Plenary Council of Baltimore, held in 1884, petitioned the Holy See to decree that for the United States of America "eos qui e sua diœcesi ad aliam transeunt, modo in hac per spatium unius saltem mensis commorati sint, eo ipso nulla facta inquisitione de animo manendi per majorem anni partem censendos esse acquisivisse quasi-domicilium quod sufficiat ad matrimonium contrahendum, eosque subditos constituendos Episcopi in ordine ad dispensationes ab impedimentis, si quæ obstent, obtinendas." After considerable delay, the answer was given in terms which did not entirely accord with the tenor of the petition. On the 6th of May, 1886, the Holy Office decreed: "Concilio Baltimorensi postulanti, supplicandum Ssmo. ut decernere dignetur in Statibus Americæ Fœderatis se transferentes a loco ubi viget Caput *Tametsi* in alium locum, dummodo ubi continuo commorati fuerint per spatium saltem unius integri mensis et status sui libertatem, ut juris est, comprobaverint, censendos ibidem habere quasi-domicilium in ordine ad matrimonium, quin inquisitio facienda sit de animo ibi permanendi per majorem anni partem." This decree was approved by Pope Leo XIII, 12th of May, 1886. (Cfr. De Becker, op. cit., pp. 97-8).

The same S. Congregation, on the 9th of November, 1898, granted the following privilege for the city of Paris: "Se conferentes in civitatem Parisiensem ex alio loco vel parœcia, dummodo ibi commorati fuerint in aliqua parœcia per sex menses, censendos esse ibidem habere quasi domicilium in

ordine ad matrimonium, quin inquisitio facienda sit de animo ibi permanendi per majorem anni partem, facto verbo cum Ssmo."

Finally, in 1903, the Cardinal Archbishop of Paris petitioned the Holy See to extend to his diocese the privilege granted to the United States in 1886. This was done by a decree of the S. Congregation of the Council on the 20th of May, 1905.

Moreover, many Provincial Synods, in laying down the conditions necessary for the acquisition of the rights of parochiality for marriage, have departed from the canonical conception of the quasi-domicile, by requiring only actual residence for a period of six months, six weeks, or one month, no mention being made of the *intention* of remaining in the particular parish for a fixed period. Father P. de Langogne has gathered together a number of these Synods from the "Acta et Decreta Sacrorum Conciliorum Recentiorum—Collectio Lacensis." Thus the Provincial Synods of Rheims (an. 1849) required six months' residence (*Collectio Lacensis,* vol. IV, col. 126-7). The Synod of Rouen (an. 1850) and Sens (an 1850) fixed the same period (ib., col. 531). The Synod of Bourges (an. 1850) was content with only one month (ibid, col. 1118-9): similarly the Synod of Auch (an. 1851) (ibid., col. 1191). The diocesan Statutes of Cambrai and Nantes permit marriage to be contracted after a month's residence in a parish. The Provincial Synods just referred to were all duly revised and passed by the S. Congregation of the Council, and there can be no doubt of the legality of their statutes.

The *intention* (*animus commorandi*) is the weak point in the canonical quasi-domicile; and it is this

condition which has caused the great majority of the difficulties that have arisen concerning the validity of marriages from the point of view of clandestinity. For marriage is an external, public act, and pertains to the public law, and consequently it should be capable of proof by evidence that can be presented in a public court of law, and can be held to be conclusive by such a tribunal. The validity of a marriage is, however, very frequently dependent, in the last analysis, on this intention of residing in a particular parish for a given period. Such an intention is an internal act, and one which is not naturally manifested by external signs and acts. It is very different with regard to the acquisition of domicile. That also requires an internal intention, viz. of perpetual residence, but this is an intention that is naturally demonstrated by external acts, e. g. the transfer of one's household, acceptance of an office in a particular place for an indefinite period, the purchase of a house, land, etc. But as a rule, the intention of residing in a parish for a limited period, say, of six months, is not accompanied by external facts which are its natural manifestation, especially in the case of persons who leave their home in search of work, and pass from parish to parish, town to town, staying in each place only as long as the temporary labour which they obtain, keeps them. Nevertheless, it not unfrequently occurs that men in this position wish to marry; and, when questioned, will affirm their intention of residing for a considerable time in the parish, when such intention does not really exist. And upon this depends the validity of their marriage. Hence the Holy Office, in the Instruction

cited above, said: "In re autem occulta et interna difficile est hujusmodi indicia habere quæ judicem securum faciant:" and the Plenary Council of Latin America (1899): "Argumenta queis de prædicto nupturientium animo constare possit, nonnumquam præsto minime sunt. Ad indicia tunc recurrendum est: quæ res est deceptionum periculis plena" (n. 956).

Several modern authors have therefore given expression to their desire to see a change introduced in the canonical jurisprudence of domicile and quasi-domicile. "Optandum est ut disciplina canonica de domicilio vel quasi-domicilio in ordine ad matrimonium in multis perficiatur et ad nostrorum temporum circumstantias magis aptetur" (Gasparri, n. 1089, note 2). "Quamvis cuique liceat modeste exprimere votum de modificatione afferenda legislationi communi circa quasi-domicilium, nefas est partes assumere legislatoris et indubias conclusiones in dubium adhuc revocare" (De Becker, op. cit., p. 95). Boudinhon (*Quelques Réflexions sur le domicile et le quasi-domicile,—Le Canoniste Crnt.*, vol. 22, an. 1899, p. 282) applies the existing legislation to certain special cases, and having concluded for their invalidity, he says: "It is hard to have to come to this conclusion; but I do not see how it is possible to escape the stringency of the law. It is not for me to suggest a modification of the jurisprudence; but it will not, I trust, be regarded as an impertinence on my part, if I affirm the necessity of some modification; for consequences so serious, and so embarrassing for the contracting of marriage, cannot but make invalid marriages frequent,—a result which the Church could never have intended. Moreover the invalidity of these marriages, arising

as it does from facts apparently so insignificant as residence on one side or the other of a street, are understood with great difficulty by the faithful, and give them great scandal (1)."

But the difficulty was perceived as far back as the year 1870, when many bishops in the Vatican Council petitioned the Holy See to modify the law. The German Bishops in their *Postulatum* (Collectio Lacensis, VII, col. 873) said, "Hodierno autem tempore, quo jam plurimis locis matrimonium quod vocant civile, per leges civiles præscriptum est, atque impedimenta canonica formaque a Concilio Tridentino pro matrimonio contrahendo præscripta, per easdem leges civiles non amplius agnoscuntur, plurima connubia ubique fere contrahuntur, quæ ex jure canonico nulla sunt censenda, et exinde peccata...

"Præterea commercium hominum atque nationum etiam maxime inter se dissitarum, necnon *domicilii sive commorationis immutatio* frequentissima, quæ moderno tempore ubique fere pristinæ immobilitatis et stabilitatis locum obtinuerunt, impedimentorum matrimonii indagationem valde difficilem eorumque immutationem valde necessariam reddant" (*Collect. Lacensis*, Col. 873, vol. 7).

---

(1) Similarly the Editor of the *Acta S. Sedis* in a note appended to the *Votum* of Father P. de Langogne (vol. 39, p. 318): "Quidquid de præsenti quæstione sentiendum sit, in omnium tamen votis est ut, attentis peculiaribus hodierni temporis conditionibus, in novo codice ecclesiastico decernatur: ut *quilibet* Ordinarius vel parochus aut etiam simplex sacerdos ab alterutro rite delegatus, saltem intra limites proprii territorii, valide matrimonio assistere possit."

The *Postulatum* of the French Bishops contained the following passage: "*De modificando clandestinitatis impedimento.* Si hoc impedimentum dirimens servandum judicetur, saltem ita attemperetur conditio, quæ exigit sub pœna nullitatis præsentiam *proprii* sacerdotis exclusive ad alium, ut in posterum gravissimi hujus contractus et sacramenti validitas non dependeat ex tam facilibus erroribus, qui circa quæstiones *domicilii* ac consequenter circa qualitatem *proprii sacerdotis*, oriri et subrepere possunt: unde fit ut multa matrimonia, etiam in facie Ecclesiæ contracta, nulla sint" (ibid. VII, col. 842).

All these reasons were before the Holy See, when it determined in 1905 to modify the canonical jurisprudence on the law of clandestinity (See *Votum* of Father Pius de Langogne). The Consultors of the S. Congregation of the Council were agreed that the *parochus proprius* should no longer be necessary for the validity of marriage: in other words, that marriage should be valid even though the contracting parties had neither domicile nor quasi-domicile in the parish in which they were married. They must be married by the *local* parish-priest or his delegate. But for the lawfulness of the marriage residence of one month in the parish was to be required. On one point, however, opinions were divided. Some thought that a distinction should be made between the *parochus proprius* and the *parochus non proprius,* by allowing the former to marry his subjects anywhere, even outside his own parish, while the latter could validly assist at marriage only in his own territory (See *Acta S. Sedis*, vol. 40, p. 537, 540, 564, 568). On this proposal the Secretary of the Congregation Mgr.

(now Cardinal) De Lai, made the following comment (ibid., pag. 564): "Omnia suadent ut potestas parochorum quoad matrimonii celebrationem reddatur territorialis. Præ primis enim quum omnes civiles Codices hoc principium utpote opportunius adoptaverint in actis celebrandis nuptiarum uti aiunt civilium, non suppetit sufficiens ratio cur Ecclesia illud non sequatur in matrimoniali materia. Accedit præterea quod, abolita disciplina parochi *proprii* atque extensa facultate parochis valide assistendi matrimoniis etiam non subditorum, congruum videtur quod saltem hæc amplissima ipsorum facultas coarctetur intra limites propriæ jurisdictionis, ut inde confusiones et præsertim contestationes parochi proprii diversa sub forma in posterum vitentur. Absque dubio saltem quælibet necessitatis aut utilitatis ratio desinit, ut parochus assistat matrimonio proprii filiani in aliena parœcia. Id eo vel magis tenendum est, quia celebratio matrimonii eum actorum complexum requirit, v. gr. publicationes, solemnem benedictionem, adnotationem in libris parochialibus, etc., quæ minime conveniunt parocho extra proprium territorium, quæque difficulter ab eodem peragi poterunt debita cum sollertia ac diligentia." This reasoning prevailed; and the S. Congregation decided that no parish-priest or Ordinary could for the future validly assist at marriage outside his own territory; but that within his jurisdiction he could validly marry all who presented themselves, whether parishioners or non-parishioners.

§ 3.

The third and last requisite for the validity of marriage, according to the new Decree *Ne Temere*, is that the parish-priest or Ordinary who acts as the ecclesiastical witness, be invited and requested to celebrate the marriage, that his presence be voluntary and not due either to physical force or to intimidation, and that he interrogate the contracting parties and receive their mutual consent.

This provision of the new Decree is a distinct departure from the Tridentine and post-Tridentine discipline. The words of the Tridentine decree *Tametsi—præsente parocho*—were meant and understood in their strictly literal sense, viz, that for the validity of marriage the mere presence, or *passive* assistance, of the parish-priest as a witness was sufficient, without any active intervention on his part. I have already quoted more than once the passage in which Pallavicini records this expressed intention of the Council of Trent (*Istoria del Concilio di Trento*, tom. V, lib. 22, c. 8, n. 17) but his words will bear repetition in this place: "When the petition of the French Orators asked that the Priest should *preside* (*præfuerit*) at matrimony, a word which meant more than the simple presence of a witness, namely, consent and authority, the Fathers, in order to maintain, as far as possible, liberty of contract by requiring only the security and stability of the proof, did not wish that the part taken by the Parish-priest should be more, as far as the validity was concerned, than the ministry,

requested indeed but even forced, of his eyes and ears."

It was not long before the Holy See was asked to give an authoritative decision on the matter. The Bishop of Jaen in Spain put to the S. Congregation of the Council in the year 1581, a series of questions, the third, fourth, and fifth of which relate to our present subject (1). In the third, he asked whether a marriage would be valid at which the priest was present against his will and under compulsion; and the S. Congregation answered in the affirmative. The priest must understand what is being done (*ad 4*); but it was not necessary for the validity of the marriage that he should be invited or requested to act, or that he should take

---

(1) The text of the three *dubia* is as follows:

" 3^{um} — Si invitus, et compulsus per vim adsit Sacerdos, dum contrahitur matrimonium, præcedente vel non præcedente dicta prohibitione, utrum tale matrimonium subsistat? — *Resp.* — Subsistere.

" 4^{um} — Si Sacerdos adfuerit, nihil tamen eorum quæ agebantur, vidit, neque audivit, utrum tale matrimonium valide contrahatur, vel potius, tamquam sine Sacerdote, nullius sit ponderis et momenti?— *Resp.*— Non valere, si Sacerdos non intellexit: nisi tamen affectasset non intelligere.

" 5^{um} — Si adsit Sacerdos, dum contrahitur matrimonium, casu non cogitans se esse ad id vocatum; sed aliud agens, audit duos inter se contrahentes matrimonium, utrum sit validum tale matrimonium, in quo fuit præsens, non tamen certioratus, nec ad id expresse vocatus, neque interponens suam auctoritatem dicto vel facto: vel potius sit nullum, quasi assistentia auctoritativa per Concilium requiratur, et non nuda vel casualis præsentia?— *Resp.* — Valere, etiamsi Parochus aliam ob causam adhibitus sit ad illum actum."

any active and authoritative part in the ceremony (*ad 5*). The whole subject is exhaustively treated by Benedict XIV in his work *De Synodo Dioecesana*, lib. 13, c. 23, where also the text of the decisions *in Giennensi* just mentioned may be found. It is sufficient, however, to have here outlined the discipline hitherto in force.

Such fraudulent "surprise" marriages, though valid according to the Tridentine discipline, are, nevertheless, of their own nature gravely illicit.

For, in the first place, they are a violation of the rite prescribed by the Church for the celebration of marriage. Both the Council of Trent (sess. 24, de reform. Matr., cap. 1) and the Roman Ritual require that the consent of the contracting parties be expressed in response to the interrogations of the priest; and to omit the whole ecclesiastical ceremony is certainly a grave violation of precept. Moreover, fraud or violence used against the parish-priest in order to secure his presence at the interchange of the matrimonial consent, is an offence against the dignity of the Sacrament of Matrimony and an outrage upon the Church in the person of her public official and representative, the parish-priest. It is also against the principles of natural equity that the offender should be allowed to benefit by his fraud, deceit or violence. It is therefore not surprising that the S. Congregation of the Council, when it decided that the time had arrived for making a substantial change in the form for the celebration of matrimony, directed the two canonists who were to report on the matter, to take as one of the foundations of their work the essential condition that the parish-priest must be present by

request and voluntarily, so as to abolish all "surprise" marriages ("che il parroco debba assistere al matrimonio, rogato e voluntariamente, di maniera che restino aboliti tutti i matrimonî fatti per sorpresa:" *Acta S. Sedis*, vol. 40, p. 531). Father Wernz, S. J., with characteristic acuteness, seems to have anticipated that the canonical jurisprudence must soon undergo modification in this respect, for in his *Jus Matrimoniale* he twice explains that there is nothing to prevent the Church from requiring that the making of the matrimonial contract in the form of question and answer on the part of the priest and the contracting parties respectively, —a form hitherto necessary only for the lawfulness of the marriage,—be henceforward a condition essential to the validity of the contract: and that such legislation would effectually prevent these marriages being sprung upon the parish-priests, who under the old discipline were practically helpless in the matter.—"Ex natura rei nihil obstaret, quominus Ecclesia solemnes illas interrogationes et responsiones in Rituali Romano ad *licitam* celebrationem nuptiarum statutas requireret ut *solemnitates essentiales* ad instar antiquarum formularum solemnium juris Romani v. g. Spondesne? Spondes. Qua disciplina instituta parochi, qui nunc in ordine ad valorem matrimonii sola sua assistentia passiva interveniunt, sed contra improvisas nuptias et sponsorum dolos sunt fere inermes, melius essent protecti." (Op. cit., n. 190, note 273; see also n. 158, I).

And there is no doubt that the liberty accorded by the Council of Trent and the canonical jurisprudence for the valid celebration of matrimony has been frequently abused. On the other hand the parish-

priest is *ex officio* bound to assist at the marriages of his parishioners, unless he has just cause for refusing, e. g. the existence of a canonical impediment. But it is not the duty of the parish-priest to decide as to the suitability of a marriage; and if he declined to fulfil his office as the Church's representative, the contracting parties would be justified, if no other means were available, in taking steps to secure his presence by stratagem, and even, in the last resort, by force (St Alphonsus, *Theol. Moral*, VI, n. 1093: Ballerini-Palmieri, op. cit., VI, n. 1251). A parish-priest who thus refused to do his duty would certainly sin, and in so far as the persons who wished to be married acted wrongfully in compelling the presence of the parish-priest, he himself would share in their guilt. This is the teaching of Ballerini (loc. cit.); "Profecto parochi hac in re peccare et ipsi graviter possunt, si ipsi in causa sint, cur sponsi ad hoc consilium confugiant. Nisi graves adsint causae, cujusmodi foret aut Episcopi interdictum aut aliquod impedimentum impediens, non potest licite parochus suam recusare assistentiam et cum plerisque recursus ad Episcopum difficilis sit, vel quia ignorant hoc remedium, vel quia infimae genti aut longe ab Sede Episcopali grave molestum, difficile apparet, certe parochus particeps est peccati, si isti ita contrahant. Nec apparet, quomodo quidam parochi de potentia sua confisi putent sibi licere ad arbitrium alios vexare aut cur suscipere has vel illas contendentium partes eo usque licitum putent, ut matrimonia velint impedire: quæ iniqua sunt æque ac ridicula et in hisce casibus jure suo utuntur, si qui parochum utcumque deprehendant et sic contrahant."

An interesting illustration of the subject under discussion occurs in Manzoni's famous romance *I Promessi Sposi.* The parish-priest, Don Abbondio, intimidated by the threats of a powerful and unscrupulous nobleman, Don Rodrigo, refuses at the last moment to marry a young couple of his parish, Renzo and Lucia. Following the advice of Lucia's mother, they present themselves with two witnesses before the parish-priest, having made their way into his house by means of a trick, and Renzo says: "Father, in the presence of these witnesses, this is my wife." Lucia, in her turn, begins: "E questo," —"and this man,"— when the parish-priest throws a table-cloth over her head to prevent her from speaking, and makes his escape from the room. There can be no doubt that under the circumstances the betrothed were quite within their right in thus appearing before the parish-priest in order to secure his presence at their marriage; and it is equally certain that the parish-priest acted wrongly in refusing to marry them, though, of course, he is to be excused, as his refusal was due to the influence of grave fear. With regard to the marriage itself, although the betrothed left the parish-priest's house with the conviction that their attempt to contract a "surprise" marriage had been unsuccessful, I think that it may be seriously questioned whether the marriage was not valid after all.

The only point that can be at all doubtful is whether the bride's consent was sufficiently manifested. In my opinion the two words pronounced by Lucia: "E questo,"—"and this man,"—following upon Renzo's declaration: "This woman is my wife," demonstrated her intention and consent suf-

ficiently for the validity of the marriage, especially as the parish-priest himself prevented her from proceeding; for by this very action he showed that he understood what was taking place, viz., that Lucia was expressing her consent to the marriage. This view is borne out by the decision of the S. Congregation of the Council *in Giennensi, ad 4*, mentioned above, viz. that marriage is not valid, if the priest does not understand what is being done, "*unless he feigns not to understand,*" — "*nisi tamen affectasset non intelligere,*" and by the commentary of Benedict XIV on this decision (*De Syn. Diæc. loc. cit.*) (1).

However, since the Decree *Ne Temere* invalidates all such "surprise" marriages, this remedy will no longer be available, should the parish-priest, whether justly or unjustly, refuse to assist at a marriage. But the new legislation provides a much better remedy; for all parish-priests and Ordinaries can validly marry any persons who present themselves, even though these are not their subjects; and in a case of necessity such marriage would also be licit. Of course the contracting parties should in such a case appeal to their own Ordinary, who will see that justice is done. But as Ballerini says (loc. cit. supra), it is not always possible to have recourse to the Ordinary. (See *Votum* of Mgr. Sili, *Acta S. Sedis,* vol. 40, p. 538).

The new decree, then, provides that the parish

---

(1) If such a case had been brought for decision before the S. Congregation of the Council, that tribunal would probably have ordered the renewal of the consent before the parish-priest *ad cautelam* (See Ballerini-Palmieri, n. 1250).

priest must be present willingly and at the request of the parties to the marriage. It may be asked whether the other two witnesses are covered by this clause so that they also must be free agents present by invitation.

There is nothing to show that the other witnesses are included in this proviso: and we may once more make use of the principle: *Legislator quod voluit expressit, quod noluit, tacuit.* Nor can it be said that the omission was due to inadvertence; for it was suggested by Prof. Lombardi in his *Votum*, and by various Consultors in the subsequent discussions (*Acta S. Sedis*, vol. 40, p. 570, not. 1). The suggestion however was not accepted. Prof. Lombardi indeed argues that if the parish-priest, who is the principal witness, must be requested to act, so also must the two secondary witnesses, and that it would be inconsistent to allow the unwilling and forcible presence of the latter to be valid, when the former must be present voluntarily and by invitation: "Quoad testes, quum in posterum parochus debeat esse rogatus, videretur idem dicendum, et hinc addendum: *testibus rogatis*. Nam si rogatus debet esse testis principalis (seu parochus), idem videtur repetendum de secundariis, eo magis quod repugnaret testes interesse posse valide, v. g. detentos per vim, non vero parochum" (*Acta S. Sedis*, vol. 40, p. 546, not. 1). But this reasoning is manifestly fallacious.

It is precisely because the parish-priest is the *principal* witness, the *testis qualificatus*, the official representative of the Church, that the new law requires that he should be a free agent when fulfilling this office. This is necessary to protect the par-

ish-priest in the execution of his duty, and to safeguard the dignity of the Sacrament and of the Church. The same necessity does not exist in the case of the other witnesses. Hence theologians agree that to compel the presence of the secondary witnesses is only a venial fault (Gasparri, n. 1159: S. Alph. Lig., op. cit., VI, n. 1093). Force or fraud is illicit; and no doubt the S. Congregation considered this to be sufficient protection for the witnesses; especially since the parish-priest must be a free agent and take an active part in the ceremony of marriage; for thus he can insist, under pain of refusing to assist at the marriage, that the witnesses be not unlawfully compelled to be present against their will.

CHAPTER III.

Conditions for the Licit Celebration of Marriage.

"V. — Licite autem adsistunt,

"§ 1. constito sibi legitime de libero statu contrahentium, servatis de jure servandis;

"§ 2. constito insuper de domicilio, vel saltem de menstrua commoratione alterutrius contrahentis in loco matrimonii;

"§ 3. quod si deficiat, ut parochus et loci Ordinarius licite matrimonio adsint, indigent licentia parochi vel Ordinarii proprii alterutrius contrahentis, nisi gravis intercedat necessitas, quæ ab ea excuset.

"§ 4. Quoad *vagos*, extra casum necessitatis parocho ne liceat eorum matrimoniis adsistere, nisi re ad Ordinarium vel ad sacerdotem ab eo delegatum delata, licentiam adsistendi impetraverit.

"§ 5. In quolibet autem casu pro regula habeatur, ut matrimonium coram sponsæ parocho celebretur, nisi aliqua justa causa excuset."

§ 1.

The Church requires proof that the contracting parties are free to marry, before she permits the priest to assist at their marriage. The new law, however, makes no change in the process by which the *status liber* is proved; and so it is not necessary to enter into that matter. There is just one point that is new. According to the common law hitherto in force, it was the duty of the Ordinary

to enquire into and judge of the *status liber*. But in most places this has become obsolete, and it is the custom for the parish-priest to conduct the enquiry himself and to do all that is necessary for the lawful celebration of the marriage, without troubling the Ordinary, unless a dispensation is necessary, or the contracting parties are *vagi*. This now becomes the law of the Church, for the new decree imposes upon the one who assists at the marriage, whether the parish-priest or the Ordinary, the duty of carrying out all the necessary preliminaries.

§ 2.

As we have already seen, any Ordinary or parish-priest in the world can validly assist at marriage in his own territory, even though the contracting-parties are not subject to his jurisdiction. Nevertheless, the presence of the *parochus contrahentium proprius* or the *Ordinarius proprius* is still necessary for the licit celebration of matrimony. But a change has been made in the conditions for acquiring the rights of parochiality for the purpose of contracting marriage. The *parochus proprius* is the parish-priest of the domicile of one or other of the contracting parties; or the parish-priest of the place where one of them has been residing for a month. Similarly the *Ordinarius proprius* is the Ordinary in whose diocese either of the contracting parties is domiciled or has resided during a month. The changes introduced into the discipline may therefore be thus enumerated:

1° Neither domicile, nor quasi-domicile, nor any period of residence in the place where the marriage takes places, is necessary for its validity.

2° For the licit celebration of the marriage, residence of at least one month in the place of the marriage is necessary, if neither of the contracting parties is domiciled there. If one of them possesses a domicile in that place, the marriage may be celebrated both validly and licitly from the day on which the domicile began to exist. Otherwise, a full month of residence must be passed. *Intention* to remain for a month is not sufficient (1).

By a *month* is understood a full calendar month: e. g. from the 1st of January to the 1st of February, from the 6th of February to the 6th of March, from the 10th of April to the 10th of May.

3° The new decree makes no mention of the quasi-domicile. Hence marriage cannot be licitly contracted by those who have only a quasi-domicile in the place of the marriage, until a full month of actual residence has expired. (Quasi-domicile is here understood in the sense of the Instruction of the Holy Office, 7th of June, 1867).

4° By *the place of the marriage* (*in loco matrimonii*) the parish is to be understood if the parish-priest assists at the marriage. If the Ordinary assists, the *locus matrimonii* is the whole diocese. This, of course, refers only to the month's residence, not to the domicile, which is necessarily in a parish or district.

---

(1) After having been married on the qualification of a month's residence, the married couple may at once leave the place definitely. They are not bound to any temporary residence there after the marriage.

§ 3.

If neither of the contracting parties has a domicile or has resided for at least a month in the place where the marriage is to be celebrated, the local parish-priest or Ordinary, to assist licitly at the marriage, must obtain the permission of the *parochus proprius* or *Ordinarius proprius* of one of the contracting parties. This supposes that neither of the contracting parties is a *vagus*, i. e. one who has no fixed domicile at all, and has not acquired the rights of parochiality in any place by residing there for a month: for a *vagus* has no *parochus proprius* or *Ordinarius proprius* other than the parish-priest or Ordinary of the place in which he is staying for the time being; and so there is no one to whom application can be made (1). But special provision is made for the marriage of *vagi* in the next section of this article of the decree.

The present section, then, supposes that both the contracting parties possess parochial rights in some place other than that in which they are to be married, and not in the place of the marriage. In such a case, the parish-priest of the latter place must obtain permission from the *parochus proprius* or *Ordinarius proprius* of one of the contracting parties, to perform the marriage.

(1) I am aware of the existence of the view that *vagi* may be validly and licitly married before any parish-priest in the world. How the new Decree affects this theological opinion will be shown in § 4. In any case, what I have said in the text remains true, that there is no parish-priest to whom application for this permission can be made.

This permission, which is required only for the *licit* celebration of marriage by a *parochus non proprius*, must be carefully distinguished from *delegation*, which is necessary for the *validity* of a marriage when it is celebrated by a priest other than the *local* parish-priest or Ordinary. It is the *local* parish-priest who delegates, whether he be *parochus proprius* or not; and even the *parochus proprius* himself can neither licitly nor validly assist at the marriage of his subjects outside his own territory without delegation from the local parish-priest. On the other hand, the local parish-priest who is not the *parochus proprius* of the contracting parties, can validly marry them, but not licitly, if he has not the permission of the *parochus proprius* to do so. This permission, therefore, is not identical with delegation strictly so called, and is not attended by such rigorous conditions. Thus while delegation must be real and actual, and antecedent to the marriage, presumed permission is admitted in the present case, and may be acted upon if the particular circumstances warrant such a course. For example, if the local parish-priest has already applied to the *parochus proprius* for permission, but serious inconvenience would result if the marriage were delayed till the answer arrived, the local parish-priest may act, if he has good reason to believe that the reply is in the affirmative (*permissio præsumpta*). Or even, it may be desirable to celebrate a marriage at once, without even making the application for permission. If there is sufficient reason for taking this course, and the local parish-priest has a well-founded opinion that the *parochus proprius* would have no objection, if his leave were

asked, he may proceed with the marriage (*permissio interpretativa*). In the latter case the local parish-priest should regularize his action, by obtaining the subsequent ratification of the *parochus proprius*.

In the cases which I have just supposed, the reason for expedition is merely one of serious inconvenience. But if there is real urgent necessity that the marriage be celebrated without delay, there is no need at all to obtain the permission of the *parochus proprius*, for the law explicitly makes this exception. Cardinal Gennari gives the following examples: "When the contracting parties are obliged to leave the place immediately and the marriage must be celebrated there; or when serious loss or injury would ensue if the marriage were at all delayed. In such cases the parish-priest may celebrate the marriage without being under the obligation of asking the permission in question, even afterwards. He should, however, make sure that the necessity is real, and he should have some proof of it, either in writing, or the oral testimony of a witness, which he will be able to produce if his action is afterwards called in question. It is well also to note the cause in the marriage register" (*Breve Commento, ecc.*, p. 27). These precautions should be taken also if the case, previously mentioned, of interpretative permission occurs.

In a case of real necessity, the local parish-priest, since he is relieved by the law of all obligation to have the permission of the *parochus proprius*, may licitly celebrate the marriage even against the latter's will and in spite of his prohibition. But the unwillingness or the prohibition of the *parochus proprius* will be an additional reason for enquiring carefully into the reality of the necessity.

The question now arises: to whom should application for this permission, when it is required, be made? For there may be several persons who have the right to give it. There is, first of all, the Ordinary of the domicile of the contracting parties: and if the latter live in different dioceses, the Ordinaries of both dioceses possess the right. Secondly, there is the parish-priest of domicile: and if the couple who are to be married dwell in different parishes, there are two *parochi proprii*. Application should be made to the parish-priest before the Ordinary is approached; and to the parish-priest of the bride before the parish-priest of the bridegroom, according to § 5 of this article of the Decree.

It may be asked: Would it suffice to obtain this permission from the parish-priest of the place where one of the contracting parties has been living for a month, having no intention of abandoning his original domicile? It will make the matter clearer if I put a concrete case. Let us suppose that a man domiciled in Liverpool and a woman domiciled in Birmingham wish to be married. In the meantime, business calls the man to Northampton where he remains for more than a month. It is arranged that the marriage shall take place in London; and so the man leaves Northampton and joins his bride in the Metropolis. The London local parish-priest should apply for permission to perform the ceremony, first to the parish-priest of the bride at Birmingham; failing him, to the parish-priest of the bridegroom at Liverpool. But the question is: Is the parish-priest at Northampton, in whose parish the bridegroom has resided for a month, competent to

give this permission to the local parish-priest in London, where the ceremony takes place?

I take it that the principle which will furnish the correct answer is this: — That parish-priest can lawfully give permission for the licit celebration of a marriage in another parish, who can validly and licitly celebrate the marriage in his own parish. Now the parish-priest at Northampton has become the *parochus proprius* of the bridegroom, by reason of the latter's residence for a month in his parish. He can therefore, given a just cause (see § 5 of this article), licitly celebrate the marriage in his parish at Northampton. Consequently, as long as he remains the bridegroom's *parochus proprius*, he can give permission for the licit celebration of the marriage in London. But in order that he remain the *parochus proprius* of the bridegroom, it is necessary that the latter should continue to be a temporary resident in the parish; for once he severs his connection with the parish by definitely leaving it, the parish-priest thereby ceases to be his *parochus proprius*. If, then, the bridegroom leaves Northampton to be married in London, and has the intention of not returning, any permission that the parish-priest at Northampton may have given or may give in the future, becomes *ipso facto* null and void. If, on the other hand, the bridegroom merely runs up to London for the marriage, and intends to return to Northampton immediately and to reside there for a short time longer in order to complete his business, the permission of the parish-priest at Northampton would hold good.

Should the parish-priest of the bride, to whom application is first to be made, refuse permission,

his decision must be accepted if he has just cause for his refusal. If, however, the contracting parties have good reason for wishing to be married elsewhere, they can refer the matter to the Ordinary of the bride, or apply to the parish-priest of the bridegroom, if the latter lives in a different parish from that of the bride.

If a local parish-priest, not being the *parochus proprius* of either the bride or the bridegroom, assists at their marriage without this permission, the marriage is valid, but he acts illicitly, and becomes subject to the special penalty inflicted by article X of this Decree, viz., "Parish-priests who assist at the marriage of anyone in violation of the rules laid down in §§ 2 and 3 of n. V, may not appropriate the stole fees, but must remit them to the parish-priest of the contracting parties."

Permission to assist at a marriage naturally includes the permission to bless the marriage, anp whenever a parish-priest, with or without permission, licitly assists, he may also licitly, and should, bless the marriage; except, of course, when there is a canonical prohibition, as in the case of a mixed imarrage, marriage within the forbidden times, etc.

§. 4.

Vagi, according to the old discipline, are persons who have no fixed domicile or quasi-domicile in any parish. According to the new Decree, and as far as the Sacrament of Matrimony is concerned, they are persons without a domicile, who have not resided in one particular place for a whole month

immediately before their marriage. The question therefore at once arises: What parish-priest is competent to assist at the marriage of *vagi*, so that it will be valid in the eyes of the Church? Hitherto there have been two opinions: one, that only the parish-priest of the place where the *vagi* are for the time being actually staying, can validly marry them: the other that they can be validly married by any parish-priest in the world. But this second opinion may be understood in two ways: 1° that any parish-priest can validly assist at the marriage of *vagi*, provided that they are actually in his parish; 2° that any parish-priest can validly marry them even in another parish, that is, anywhere in the world. If this second view is taken in the former sense,—and there is reason for thinking that many theologians who propounded or accepted it so understood it—, there is no real difference between the two opinions; while, if understood to mean that any parish-priest can validly assist at the marriage of *vagi anywhere*, the second opinion has not the support of any argument of weight, nor has it great probability (See Father Wernz, apud *Acta S. Sedis*, vol. 32, pp. 402-4; and *Jus Matrimoniale*, n. 178, note 193). Cardinal Gasparri (n. 1090) advises that in practice the first opinion be followed in the case of a marriage about to be celebrated: but if the validity of a marriage of *vagi* already celebrated by a parish-priest outside his parish is under discussion, it is to be regarded as valid, until the Holy See otherwise decides.

Well, the Holy See, by the Decree *Ne Temere*, has now decided otherwise. According to the decree, no parish-priest can validly assist at mar-

riage outside his own territory, whether the contracting parties be *vagi* or not. Consequently, the second opinion decribed above will, when the Decree *Ne Temere* comes into force, become utterly obsolete and a mere relic of the past history of theology and canon law. This of course is not retrospective, but applies only to those marriages that take place when the new law is in actual operation.

Therefore only the local parish-priest or the local Ordinary, acting within his own territory (or the delegate of either, with the same territorial limitation), can validly assist at the marriage of *vagi*, according to the new Decree.

Nor is this all. *Vagi* become the parishioners of the parish-priest of the place where they are temporarily residing. Hence the *local* parish-priest is their *parochus proprius*. Consequently he does not require the permission of any other parish-priest for the *licit* celebration of the marriage.

It may be, however, that only one of the contracting parties is a *vagus*, the other possessing a canonical domicile. Even so, the parish-priest of the place where the *vagus* is actually staying is his *parochus proprius*, and therefore the *parochus proprius* of both for the purposes of marriage, although the other of the contracting parties is domiciled elsewhere. But if it is the man who is *vagus*, then, according to § 5 of this article of the decree, the marriage should take place before the parish-priest of the bride, or his permission should be obtained, unless the local parish-priest has just cause for proceeding with the marriage without it. If the bride is without domicile, there is no obligation to apply for permission to the parish-priest of the place where the bridegroom is domiciled.

But a special restriction has been imposed upon the *licit* celebration of such marriages. The Council of Trent (Sess. 24, *de Reform. Matrim.*, cap. 7) prescribed that parish-priests must not assist at the marriage of *vagi*, until they have made a careful inquiry and reported to the Ordinary on the matter, and have received permission from him to proceed with the marriage. The new legislation confirms that of Trent with two slight differences.

First, the parish-priest is to report either to the Ordinary, or to a priest delegated by him, and to obtain permission for the marriage from one or the other. "From this we gather that the Ordinary, at least in large dioceses, should delegate priests in the various centres of the diocese, with the duty of examining into the circumstances of the *vagi* who apply to be married, the reality of their condition as *vagi* and its proof, with the proof of their freedom to marry (*status liber*), and of reporting on the matter. For this work the Vicars Foran (Rural Deans) may be delegated" (Card. Gennari, *Breve Commento*, etc., p. 28).

Secondly, exception is made for a case of urgency; so that when there is not time to apply to the Ordinary or to his delegate, the parish-priest may take upon himself the responsibility of the marriage.

It may be noted that the provision of the new Decree requiring a month's residence in the place of the marriage instead of the quasi-domicile of the expiring jurisprudence, makes a further change in the definition of a *vagus*, which change appears only when the definition is expressed in great detail. For, as I have already said (see § 2 of this article),

on the authority of Cardinal Gennari (*Breve Commento*, p. 26 *b*), the "place of the marriage" is the whole diocese, if the Ordinary assists at the marriage, and the parish, if the parish-priest assists. Hence if a person who has no domicile, and has not been residing in one particular parish for a month, has nevertheless been living for a month in the diocese, the Bishop of that diocese is his Ordinary for the purposes of marriage, and therefore he is not strictly speaking a *vagus*. But there is no practical difference, for in either case the parish-priest must obtain the Ordinary's leave to assist at the marriage.

§ 5.

The custom already exists very generally that when the bride and the bridegroom belong to different parishes, the parish-priest of the bride has the prior right to perform the ceremony of marriage. This custom no doubt had its origin in the dictate of natural courtesy that the bridegroom should go to receive his bride in the church of her own parish, and not require her to seek him.

But it is a custom that has also its reasons of utility; and so, although the common law has not hitherto favoured one parish-priest more than another, enjoining only that the *parochus proprius* of either of the contracting parties is necessary and sufficient for both the valid and the licit celebration of the marriage, still a local law has been made in various dioceses (e. g. the diocese of Mechlin) giving to the parish-priest of the bride the exclusive right and faculty to assist licitly at her marriage. Hence,

where this custom or particular law exists, the *parochus proprius* of the bridegroom can assist *validly* at the marriage, but not licitly, unless he has obtained the consent of the parish-priest of the bride. This is briefly expressed by Gasparri (op. cit., n. 1074): "Pro licita matrimonii celebratione ex bonis moribus receptum plerumque est, et alicubi lege diœcesana præscriptum, ut parochus sponsæ matrimonio assistat. Hæc consuetudo aut lex rationabilis est et servari debet: qua vigente, matrimonium coram parocho sponsi est semper validum, sed est illicitum sine parochi sponsæ consensu, cui cedunt in casu jura temporalia parochi in matrimoniis." Sometimes the local law has given priority to the parish-priest of the bridegroom, but less frequently and less appropriately (Wernz, *Jus Matrimoniale*, n. 177, note 185).

Now for the first time it is made the universal rule that the marriage be celebrated before the parish-priest of the bride, unless there is just cause for celebrating it before the parish-priest of the bridegroom.

The *Acta S. Sedis* (vol. 40, p. 573, note 1) informs us that this canon was suggested by a parish-priest, the object being to prevent disputes more effectually, and to render the record of the marriage more accessible: "Hic canon a quodam parocho dictatus est, quo in praxi magis vitentur æmulationes, atque facilius inveniri possint in posterum acta matrimonialia."

A "*just* cause" excuses from this rule; so that a *grave* or *urgent* reason is not necessary. Any good reason of convenience, utility, etc., therefore will suffice to make the celebration of the marriage

before the parish-priest of the bridegroom licit. As was recommended above in the case of the local parish-priest marrying persons not his own subjects, it will be well also here to keep documentary evidence of the reason which justified the departure from the general rule (Cardinal Gennari, op. cit., p. 28 *e*).

The present Decree makes no mention of any special penalty for breaking this rule; but there is no doubt that if the parish-priest of the bridegroom *illicitly*, that is, without just cause, assists at the marriage, he may not appropriate the stole-fees, but must hand them over to the parish-priest of the bride. Indeed, one of the objects of the law, whether the local law in the past, or the new universal law, is to settle the question to whom the marriage dues by right belong (see Gasparri, n. 1074, quoted above; also Wernz, op. cit., n. 177, note 185; n. 190, note 270). The refunding of the fees is, therefore, not, strictly speaking, a penalty for illicitly assisting at the marriage, but an obligation in justice. The act of assisting at the marriage is in itself an infringement of the rights of another; and the retention of the stole-fees would be a second violation of those rights and an act of dishonesty. Hence there was no need to express the obligation of refunding the fees in the law: the general principles of morality suffice to make the duty clear.

CHAPTER IV.

Delegation.

"VI. — Parochus et loci Ordinarius licentiam concedere possunt alii sacerdoti determinato ac certo, ut matrimoniis intra limites sui territorii adsistat.

"Delegatus autem, ut valide et licite adsistat, servare tenetur limites mandati, et regulas pro parocho et loci Ordinario n. IV et V superius statutas."

As I pointed out in the last chapter, § 3, the permission required by the local parish-priest for the licit celebration of matrimony if he is not the parish-priest of either of the contracting parties, is not the same as delegation properly so called, which is necessary for the validity of marriage if the priest who assists is not the local parish-priest or Ordinary. The present article of the Decree *Ne Temere* deals with this delegation, and lays down the conditions under which it may be validly granted, and validly and licitly exercised. I have already had to treat of this subject when discussing the substance of the law under article III of the Decree (chap. I, § 3), but it was not possible to deal with it exhaustively in that place, and its further consideration was reserved until article VI was reached.

The first paragraph of this article contains the conditions for the valid granting of delegation: — 1° it can be granted only by the local parish-priest or local Ordinary — 2° to a priest distinctly and individually designated — 3° to be exercised only

within the territory of the parish-priest or Ordinary from whom the delegation is received. The first and third conditions are an application of the principle already enunciated (chap. I, § 3): "Nemo potest plus juris transferre in alium, quam sibi competere dignoscatur." The local parish-priest and the local Ordinary alone possess the inherent right of validly assisting at the celebration of matrimony (*Decree*, art. III), and that only within their own territorial jurisdiction. They alone, therefore, can validly delegate another priest to assist at a marriage, and such marriage must take place within the limits of their territory; otherwise, the delegation does not hold good, and the marriage is null and void. Hence the Ordinary can validly delegate a priest to assist at a marriage in any part of his diocese; the parish-priest can delegate only for marriages that take place in his parish.

Cardinal Gennari (*Breve Commento, ccc.*, p. 29), commenting on this condition for the validity of delegation, viz., that the delegate must assist at the marriage within the territory of the delegating parish-priest or Ordinary, writes: "This last condition, however, applies when the delegation is to be given to a simple priest. For if it is granted to a parish-priest, or, still more, to an Ordinary, the marriage can be celebrated in their territory, both validly and licitly; validly in virtue of article III of this Decree; licitly, in virtue of article IV." His Eminence must be here referring to the permission which the local parish-priest or Ordinary requires for the licit celebration of the marriage, if he is not the parish-priest of either of the contracting parties (art. IV, § 3), not to delegation in the strict sense of the

word; for the local parish-priest or Ordinary does not need delegation in order to assist validly at a marriage celebrated in his own territory, and the *parochus proprius*, if he is not the parish-priest of the place in which the marriage is celebrated, cannot validly grant delegation. Hence the parish-priest and the Ordinary are in exactly the same position as the priest who holds no pastoral office, as regards the necessity of delegation and the powers it confers, when the marriage is to take place outside their jurisdiction. If, in such a case, either of the contracting parties is subject to their pastoral jurisdiction, they still require delegation for the *validity* of the marriage, but do not need any further permission for its *licit* celebration; but if neither of the contracting parties belongs to their territory, they are exactly on the same level as the simple priest who has no parochial jurisdiction at all, viz. they must obtain the delegation of the *local* parish-priest for the validity of the marriage, and the permission of the *parochus proprius* for its lawful celebration. If the local parish-priest is also the *parochus proprius*, the delegation given by him for the validity, covers also the permission necessary for the lawfulness of the marriage.

The second condition of delegation is that the delegate be a priest personally and individually designated. Hence general delegation given indeterminately, to the effect that any priest chosen by the contracting parties, or any one of a number of priests, may assist at a marriage, becomes invalid. There is another kind of general delegation, viz., delegation that is indeterminate not as regards the person of the priest delegated, but as regards the

marriages at which he is delegated to assist; as for instance, if a parish-priest delegates each of his coadjutors to assist at all the marriages of that particular section of the parish which is under his special charge. Delegation of this kind is not invalidated by the new legislation. It has been in the past, and remains, both valid and licit. The delegation which is now made invalid is only that in which the person of the delegate is not determined. If his identity is sufficiently indicated, he can be validly delegated for any number of marriages, whether the number be definite or indefinite. It is not necessary to express the name of the priest delegated, if his identity is otherwise sufficiently manifested, as for example, when a parish-priest who has only one coadjutor, says: "My curate can perform the ceremony." But if, in the interval between the act of delegation and the marriage, that particular curate leaves the parish and another takes his place, the latter may not assist at the marriage in virtue of the original delegation, for he was not personally designated. Nor can the former curate, if he was delegated in his capacity as coadjutor (*i. e. ratione officii*), an office which he has now ceased to hold; but if the delegation was given for personal reasons (*ratione personæ*), e. g. because he is a special friend of one of the families interested in the wedding, it holds good.

In some large cities where the Tridentine decree *Tametsi* has been in force (e. g. Cologne), it has been the custom for the parish-priests to grant to one another a general delegation for the celebration of marriages. For it was found that in many cases persons who had been first living in one parish

and had afterwards removed to another, had their banns published and were married in their former parish, concealing from the parish-priest the fact of their change of residence. Having given up their domicile or quasi-domicile in the parish in which they were afterwards married, the marriage would be invalid if the priest who performed the ceremony had not the delegation of the parish-priest of their actual domicile or quasi-domicile, or of the Ordinary. In order to prevent these invalid marriages, therefore, all the parish-priests of the city agreed to delegate one another in a general way, so that they could validly assist at the marriages of persons belonging to other parishes of the same city. This practice was permitted by the S. Congregation of the Council (*in causa Coloniensi*, 18 March, 1893) under certain conditions (see Gasparri, nn. 1143 seqq.).

Cardinal Gennari, referring, in his *Breve Commento*, ecc., p. 29, to the practice just described, remarks: "We consider that under the new Decree the general delegation will be valid which the S. Congregation permits, under certain conditions, to the priests of some large cities, provided that the parish-priests are distinctly designated." I submit, however, that under the new Decree such delegation is no longer required, and also would be invalid: for the case supposes that the marriage takes place in the parish in which the party or parties formerly resided and before the parish-priest of that parish, who, according to article III of the new Decree can, of his own right, validly assist at all marriages celebrated in his parish; while, according to article IV, § 2, the parish-priest of another

parish, even though he be the *parochus proprius* of the contracting parties, cannot validly marry them in the parish of his colleague. Consequently the local parish-priest who actually performs the ceremony does not require any delegation, and the *parochus proprius* cannot give it. What, however, the local parish-priest does need is the *permission* of the *parochus proprius* for the *licit* celebration of the marriage; and there is no reason why there should not be a mutual understanding among the parish-priests that such permission may be taken for granted.

I have already said that general delegation given to coadjutors individually designated remains valid. *A fortiori*, the new Decree does not withdraw the faculties of those coadjutors who by diocesan custom or law are appointed to discharge all parochial functions, or at least have power to deal with all matrimonial matters, as it were of their own right, for in such cases no delegation at all is required. Thus the Vicar-General of Paris wrote to the Cardinal-Prefect of the S. Congregation of the Council in reference to a case of nullity of marriage on the ground of the absence of the necessary delegation: "In hac diœcesi mos invaluit, ut negotia matrimonialia sæpe sæpius exclusive et quasi jure proprio tractentur non a parocho sed a primo Vicario" (*Acta S. Sedis*, vol. 29, p. 13): and this power was confirmed by the Synodal Statutes of the Diocese of Paris, art. 446, in the year 1902.

It must not be thought, however, that all coadjutors, by virtue of their office, have a general faculty to assist at any marriage that may take place in the parish to which they are attached,

without the special delegation of the parish-priest. I have already treated this question under article III of the Decree (chap. 1, § 1), where I said that coadjutors who are appointed with the plenitude of the parochial ministry, with unrestricted powers—*ad universitatem causarum*, as it is technically expressed—have this power to assist at marriages without delegation: but that if they are appointed with entire dependence upon the parish-priest as regards the extent, limitation and exercise of their parochial functions, they cannot validly assist at marriage without their parish-priest's delegation. And as regards practice, it is to be presumed that the coadjutor is appointed in full dependence upon his parish-priest, unless the contrary is proved. The position of a coadjutor who has full and independent powers is an abnormal one, and therefore requires positive proof, before it can be admitted. No universal or general law can be laid down, for the matter depends upon local diocesan custom or legislation. We have, for example, already seen that the Diocesan Statutes of Paris provide that the senior coadjutor has full powers for all matrimonial matters. But I think it may be said that the practice is almost universal to appoint coadjutors in entire dependence upon the parish-priests.

It was therefore with surprise that I read the following question and answer in the American *Ecclesiastical Review*, vol. 37, p. 527 (Nov. 1907): "What delegation will assistant priests need, to assist at marriage ceremonies with a view to securing their validity?..."

"*Resp.* Since the terms of the decree do not particularly restrict the power of delegation in case

of witnesses to the marriage, it may be assumed that its sense is general, and includes any priest whom the pastor or bishop recognizes as an accredited substitute in ordinary pastoral functions. 'Generalis delegatio ad exercenda munia parochialia ad parochum supplendum facultatem assistendi matrimonium (1) includit.' Hence the assistant priests may be considered as having an understood right to act as authorized witnesses of all marriages, unless the pastor reserves that right to himself in exceptional cases..."

I fear that this teaching, if followed in practice, would result in many invalid marriages. The true doctrine is that the assistants may not be understood to have the right to act as authorized witnesses of all marriages, unless this right is explicitly conferred upon them by the parish-priest, or the Ordinary, or diocesan custom or law. I have already given abundant authority for this view, which is the only true one, in chap. 1, § 1; and it must necessarily hold good under the new Decree, which not only does not relax the current discipline on delegation, but makes it more stringent, by requiring that the person of the delegate shall be clearly indicated. If the reply quoted above had been limited, in its application, to priests who act as substitutes for the parish-priest in the latter's prolonged absence,—"*supplies*," as we call them,—it would have been correct; for such substitutes by the very fact of their appointment to take the place of the parish-priest in his absence, are invested with full parochial powers, and when they assist

(1) matrimonio?

at a marriage in virtue of those powers, they act not as delegate but as *parochus*. The *Folium S. Congr. Concilii* in *Faventina Matrimonii*, 2 Julii 1758, has the following: "Vicarius hic (scilicet relictus a parocho absente), licet facultas expressa ei a parocho data non fuerit, habet tamen illam a lege, Tridentino nempe Concilio; cum deputatus dicatur ad universam curam animarum, *ad differentiam capellani seu vicarii parochi præsentis, cui facultas expressa a parocho dari debet*, ideoque de matrimonii validitate ambigendum non esse, etc." (Apud Gasparri, n. 1079; italics mine).

To the authorities already quoted in support of the doctrine that coadjutors have not the faculty to assist at marriages without special delegation, I will add that of Father Wernz, S. J., (op. cit., n. 176, note 175): "Quæ doctrina (namely, that coadjutors have the power to assist at marriages when the parish-priest is incapacitated) nequit *generaliter* extendi ad *omnes illos* vicarios vel *coadjutores*, qui parocho *præsenti* et *valenti* in cura animarum *assistunt*. Cfr. S. C. C. in c. Turrit. 19 Jun., 13 Dec. 1795 et in c. Cenet. 19 April 1834; *Gasparri*, l. c., n. 1087. (I have quoted these cases in chap. 1, § 1). Quare ex *consuetudine* vel *statuto particulari* diœcesium eruendum est, num *tales* coadjutores sive ab *Ordinario* sive a *parocho* ad sacramentorum administrationem *etiam* cum jure assistendi matrimoniis per delegationem ad *universalitatem* causarum deputentur. Cfr. cit. resp. S. C. Inq. 7 Sept. 1898. Quæ delegatio generalis *quandoque* datur saltem *primo* vicario parochiali, v. g. Parisiis...; at ex disciplina aliarum diœcesium hujusmodi vicarii sive a parocho assumpti sive ab

Ordinario delegati, ut *adjuvent* parochum in iis quæ ipsis demandantur, nequeunt assistere matrimoniis, nisi a parocho pro casibus *particularibus* acceperint *specialem* licentiam. Cfr. v. g. pro Belgio, Germania, Austria, Gallia: *Feije*, l. c. n. 296, etc." (Author's italics).

It will be noticed that Father Wernz alludes to the decree of the Holy Office 7 Sept. 1898. This decree, which I quoted in chap. 1, § 3, on the Delegate, is one of great importance in the present question, and the answer given in the *Ecclesiastical Review*, which I have quoted above and against which I am now arguing, is probably based, at least in part, upon a mistaken interpretation of the words of the decision. The question was submitted to the Holy Office by Mgr Chapelle Archbishop of New Orleans (the decree, as published, suppresses the name of the Diocese; I am indebted to the Rev. P. A. Baarte, D. D., for the information), who found in that diocese an opinion prevailing, and acted upon in practice, that any priest who exercised the sacred ministry in the diocese could without special delegation assist at the marriages of any of the faithful of the diocese, in virtue of the general faculty which he possessed of administering all the sacraments which are not reserved to a bishop.

The Archbishop therefore asked if this general faculty included that of assisting at all the marriages of the faithful of the diocese. The reply of the Holy Office was: "Negative, nisi agatur de vice-parochis, qui ex consuetudine diœcesis habitualiter delegati censeantur pro propria parœcia." (*Analecta Ecclesiastica*, t. VI, p. 483-4). This decree

was published by the *Ecclesiastical Review,* vol. 20, p. 281-2 (year 1899); but in its English summary, (1) the decision was explained as referring to all *vice-parochi*, as if they, by virtue of their office as coadjutors, and universally, possessed the faculty of assisting at all the marriages of the parish. But the decision means just the opposite. It does not except all *vice-parochi*, as such, absolutely and universally. It does not say that all *vice-parochi* are by diocesan custom regarded as habitually delegated for their own parish. But it says that *it may be* that there are *some vice-parochi* to whom local custom assigns this faculty; such *vice-parochi* and such only are excepted from the operation of the decree.

That this is the true meaning of the decree is manifest, both from its actual wording, the faculty being made to depend upon *local, diocesan* custom, while the word *censeantur* in the subjunctive, is decisive against universality, for *qui censeantur* means 'if there happen to be any who are regarded, etc.'; and also from the interpretation which all canonists put upon it (see Fr. Wernz's interpretation of the decree, just quoted; Gasparri, De Becker, etc.).

Diocesan custom and law must, therefore, ultimately decide whether coadjutors have this power

---

(1) The summary is as follows: — "The S. Congr. of the Universal Inquisition decides that in places where the Decree *Tametsi* is promulgated, the ordinary faculties for administering the Sacraments do not authorize a priest to assist at marriages in the diocese without special delegation. This rule does not include the *vice-parochus...*"

or not; and it was for that reason that I said that no general law could be laid down. It does seem, however, that, as far as the United States is concerned, there is positive evidence for the presumption that coadjutors have not this power to assist at marriages without delegation. For the 111 th. Decree of the Second Plenary Council of Baltimore (year 1866) (renewing the Fourth Decree of the First Provincial Council of Baltimore) is as follows: "Cum repugnet legibus et consuetudini Ecclesiæ, bonoque animarum regimini, pluribus Sacerdotibus simul *ex æquo* concedere auctoritatem pastoralem regendi eamdem Ecclesiam, aut Districtum; et cum magna nata sit confusio et discordia in hac Provincia, pluribus Sacerdotibus simul sibi vindicantibus hujusmodi auctoritatem pastoralem *ex æquo* exercendam, absque ulla ab alterutro dependentia: statuimus et decernimus unumquemque Præsulem debere, quamprimum commode poterit, designare iis in locis in quibus plures Sacerdotes forsan requirantur, unum singulorum locorum Pastorem, cui adjutor unus vel plures in suo munere obeundo adsignari poterunt, prout Præsuli ipsi visum fuerit. In iis vero locis in quibus specialis nulla hujusmodi dispositio a Præsule facta fuerit, statuimus Sacerdotem, qui post latum hoc Decretum primus deputatus fuerit a Præsule ad id munus obeundum, habendum esse Pastorem; alios autem Sacerdotes postea deputatos, adjutores ejus habendos, donec aliter Præsul ipse statuerit" (Collectio Lacensis: *Acta et Decreta S. Conciliorum Recentiorum*, t. 3, col. 432 and col. 26).

In face of this decree, very strong positive evidence of the contrary diocesan custom as regards

assistance at marriages must be produced, before this faculty can be admitted as regards coadjutors. And that no such positive evidence exists is clear from the following passage of a letter with which the Rev. Dr. Baarte has favoured me: "This decision (of the Holy Office, 7 Sept. 1898, quoted above) seems conclusive for the United States when taken in connection with n. 111 of the Second Plenary Council of Baltimore (Decrees) together with the various diocesan statutes and the universal practice of the Bishops in making the appointments of assistants. Assistants with us are obliged to consult the rector or pastor before acting in marriage cases. Not only in the diocese of Detroit, but in all the dioceses with whose statutes I am familiar—that is almost all in the United States—it is certain that assistants need a special delegation before acting as witness for or blessing marriages." Here then is positive evidence that no such custom exists locally in the United States. Coadjutors therefore cannot validly assist at marriages without the special delegation of the parish-priest or Ordinary (1).

---

(1) The Bishop of Hexham and Newcastle, by a Circular dated January 29th 1908, has conferred upon all coadjutors in his diocese full powers to assist *validly* at marriages celebrated in the parish to which they are attached, with dependence, however, upon the parish-priest for the *licit* exercise of those powers. — "In order to avoid difficulties and doubts that might otherwise arise, we declare that whenever we appoint any priest as curate to any mission in the Diocese, we appoint him with the full plenitude of the ministry, and with full and absolute power and authority to administer the sacraments, including full power of assisting at the celebration of marriage within

*
* *

By the second paragraph of this article, it is enacted that the delegate must not transgress the terms of his commission, and that he must observe the regulations made in articles IV and V for the valid and licit celebration of marriage by the parish-priest or the Ordinary.

It is clear that the powers of a delegate are limited by the terms of the concession made to him. "Delegatus tantam solummodo facultatem habet, quantam illi delegans communicaverit" (*Acta S. Sedis*, vol. 32, p. 192). Consequently, if a delegate acts beyond the powers conferred upon him, his acts so performed are null and void. "Potestas delegata stricte est intelligenda, nec extenditur ad res et casus in delegatione non specificatos" (Riganti, *De Reg. Cancell. Rom.*, tom. I, p. 293, n. 225). Therefore, if the delegation is given for one specified marriage, it is valid for that marriage only, namely, for the marriage of the parties mentioned in the act of delegation, so that the substitution of another bridegroom or bride would invalidate the marriage (Decree of the Holy

---

the confines of that mission. But while they are thus 'delegated to the university of causes' (*delegati ad universitatem causarum*), and without any restriction in the valid exercise of their powers, in the lawful exercise of those powers they are dependent upon the Rector of the mission.

"Hence, after receiving official notice of their appointment, and after they have entered upon their appointment, they may validly assist at all marriages contracted within the area of the mission, although they may not do so lawfully without the permission of the Rector."

Office, 2 August, 1899: *Acta S. Sedis*, vol. 32, p. 191-2).

Similarly, if delegation is given for a fixed number of marriages, that number must not be exceeded; if for a definite period of time, it ceases on the expiration of that period. If the delegate is empowered to assist at a marriage or marriages in one particular place only, e. g. in a specified church in the parish (if the delegation is granted by the parish-priest) or diocese (if it is the Ordinary who delegates), his assistance would be invalid elsewhere.

Moreover any condition or stipulation upon which the delegation is made to depend by the parish-priest or Ordinary who grants it, must be observed under pain of the invalidity of the marriage. But Cardinal Gasparri on this point remarks (n. 1140) that a qualifying clause or proviso inserted into the act of delegation must often be regarded rather as a monition or instruction than as a condition in the strict sense of the term; in which case its non-observance would not invalidate the marriage, but would be illicit. Thus, if the delegate is directed to observe the ordinary form of procedure as laid down by the common law, this is not a condition affecting the validity of the marriage, but an admonition that the law must be obeyed. The parish-priest might say, for instance: "I give permission for the marriage to be celebrated by N. N., after the banns have been duly published," or, "the preliminary inquiry into the freedom of the contracting parties, as required by law, having been duly made." The neglect of such directions, though of course unlawful, would not render the

marriage invalid. Whether the qualifying clause is to be considered a strict condition or not, is to be determined by the nature of the proviso, the whole context, and the declaration of the grantor. If a doubt arises before the marriage as to the exact force of the proviso, the delegate should fulfil it, both in order that his assistance at the marriage may not be illicit, and in order not to jeopardize the validity of the marriage; or at least he should consult the grantor of the delegation, and act as by him directed.

The delegate must also observe the regulations made in articles IV and V for the valid and licit assistance of the parish-priest or the Ordinary at the celebration of matrimony. Hence:

1°— Delegation cannot be validly received from a parish-priest or Ordinary who has not yet entered on his office, or who is under public sentence of excommunication or suspension from office by name; nor can it be validly granted to a priest who is under either of these censures.

2°— Delegation can be validly exercised only within the territory of the parish-priest or Ordinary who grants it.

3°— The delegate, in assisting at the marriage, must be acting freely, at the request of the contracting parties, and he must interrogate them and receive their mutual consent. This too is necessary for the validity of the marriage.

For his licit assistance at marriage, it is required:

1°— that the delegate shall have made the preliminary inquiry as to the freedom of the parties to marry, if this has not been done by the parish-priest or the Ordinary;

2°— that the local parish-priest or Ordinary from whom the delegation has been received be the parish-priest or Ordinary of one of the contracting parties. For this it is necessary that one of the parties be domiciled or at least have resided for a month in the parish (if the parish-priest delegates) or diocese (if the delegation is from the Ordinary) in which the marriage takes place.

3°— Otherwise, besides delegation from the parish-priest or Ordinary ot the place where the marriage is to be celebrated, the delegate must also have the permission of the parish-priest or Ordinary of one of the contracting parties, unless there is grave reason for dispensing with such permission.

4°— In the case of the marriage of *vagi*, it will be the duty of the delegate to report to the Bishop or his representative, and to obtain permission to assist at the marriage, if the parish-priest has not already fulfilled this obligation.

5°— The fifth condition for the licit celebration of marriage seems scarcely to concern the delegate. It is for the parish-priest of the bridegroom to decide whether there is just reason for the celebration of the marriage in his parish; and if there is, he may lawfully delegate another priest to represent him (1).

With respect to the first and fourth conditions for the licit assistance of the delegate, it may perhaps be thought that it is the intention of the legislator that the preliminary inquiry as to the

---

(1) Unless the reason for celebrating the marriage in his parish is purely personal to himself.

status liber, and in the case of *vagi*, should always be conducted by the priest who is to assist at the marriage, so that if a delegate is to perform the ceremony, it becomes his duty as a matter of course to make all the necessary arrangements. The duty, however, belongs in the first instance to the parish-priest or Ordinary who delegates. On this point Cardinal Gennari (*Breve Commento*, ecc., p. 29-30) writes: "The parish-priest or the Ordinary is bound to ascertain the freedom of the contracting parties, their domicile, etc.; and when he has made sure that he can validly and licitly assist at the marriage, he can delegate someone else to do so. This is most true; and in such a case the delegation will be merely ministerial. But, when it is said here that the delegate must observe also the prescriptions of article V, the meaning is that when the parish-priest or the Ordinary has not made the preliminary inquiry, he may delegate a priest in whom he has confidence, whose duty it will be to conduct it accurately as prescribed in the said article V."

CHAPTER V.

Exceptions from the General Law.

In article III of the Decree, where it is enacted that "only those marriages are valid that are contracted before the parish-priest, or the local Ordinary, or a priest delegated by either, and at least two witnesses," it is also expressly stated that this general law is subject to the exceptions mentioned in articles VII and VIII. These exceptions are two in number, and both refer to cases in which it is impossible to secure the presence of a priest properly qualified to assist at marriages.

§ 1.

"VII. — Imminente mortis periculo, ubi parochus vel loci Ordinarius, vel sacerdos ab alterutro delegatus haberi nequeat, ad consulendum conscientiæ et (si casus ferat) legitimationi prolis, matrimonium contrahi valide ac licite potest coram quolibet sacerdote et duobus testibus."

By an Encyclical Letter of the Holy Office, 20 February, 1888, Pope Leo XIII granted to all local Ordinaries the faculty of dispensing from all public diriment impediments except those of priesthood and lawful affinity *in linea recta*, in favour of persons in most serious danger of death, who,

having been married only civilly, or living in concubinage, now wish to set themselves right before God and the Church, by a valid marriage *in facie Ecclesiæ*. This faculty was to be used only when there was not time to have recourse to the Holy See. On the 1st of March, 1889, Ordinaries were permitted to subdelegate this faculty generally to the parish-priests, to be used for cases in which there was not time to apply to the Ordinary. The Holy Office explained that by *parish-priests* it meant all who have the actual cure of souls, including missionaries, but excluding coadjutors and chaplains. "Comprehendi omnes qui actu curam animarum exercent, exclusis vice-parochis et capellanis. — Affirmative pro iis missionariis qui parochialibus funguntur muneribus" (23 April 1890). (All these decrees are to be found in the *Collectanea S. Congr. de Prop. Fide*, n. 1471-4). A further extension of this faculty was granted (17 February, 1892, 25 May, 1898) to certain dioceses, to the effect that the Ordinary might also delegate priests who were not *parochi* to grant these dispensations when there was not time to refer the matter to the Ordinary or the parish-priest (*Acta S. Sedis*, vol. 31, p. 59-60).

Finally, on the 13th of December, 1899, the Holy Office decided that in this faculty was included the power of dispensing from the impediment of clandestinity, so that a parish-priest to whom this faculty had been subdelegated, could in his parish marry persons not his subjects, and also, in case of necessity, dispense with the presence of witnesses. "Utrum in citatis Decretis vere comprehendatur etiam facultas dispensandi ab impedi-

mento clandestinitatis; adeo ut ex. gr. Parochus, ab Episcopo habitualiter delegatus, possit in sua Parœcia vel conjungere non suos sed extraneos inibi casu existentes, dispensando a præsentia Parochi proprii, ad quem nullimode valeat haberi recursus; vel etiam conjungere suos, sed sine testibus, pariter dispensando ab eorum præsentia, cum omnino non sint qui testium munere fungi possint.—*R.*—Affirmative" (*Acta S. Sedis*, v. 32, p. 501).

These decrees, and the faculties granted by them, still remain in force, except that which refers to the impediment of clandestinity. The Decree of the 13th of December, 1899, is necessarily revoked by the Decree *Ne Temere;* for 1° it now becomes the general law that a parish-priest can *validly* assist, in his own parish, at the marriage of persons not subject to him (art. III, IV, § 2), and also *licitly*, in a case of necessity (art. V, § 3); and 2° this present article VII provides that in a case of necessity in imminent danger of death, if the sick person, for the relief of conscience, and also for the legitimation of offspring, desires to be married, but a priest properly qualified to assist at the marriage (parish-priest, Ordinary, or delegate) cannot be summoned in time, any priest may validly and licitly celebrate the marriage provided that two witnesses are present.

This is permitted only in two cases: 1° for the relief of the conscience of the dying person, who is living with another in concubinage, or in the state of civil marriage; 2° in order to legitimate the offspring of such unions. (Only natural children who are not *spurii* can be legitimated by the sub-

sequent marriage of their parents.—Ojetti, *Synopsis*, s. v. *Legitimatio* (1).

In order that a simple priest may act in such cases, it is necessary 1° that one of the parties be in real danger of death, though there is no need to wait till death is absolutely certain and close at hand: it is sufficient that there be real danger: 2° that there be a reasonable doubt whether a properly qualified priest can arrive in time to perform the ceremony. If a priest, not qualified to assist at marriage, is already on the spot, the simplest method would probably be to obtain delegation for him from the parish-priest or Ordinary. If, however, it is probable that the messenger will not return in time, the priest may celebrate the marriage without waiting for the delegation. Nor is it necessary to use the telegraph or telephone, if available, in order to obtain delegation. If fact the use of the telegraph in petitioning for faculties, dispensations, etc., is forbidden: "Si quæ gratiæ seu

---

(1) This is modified, however, by the following decree of the Holy Office: "Utrum per litteras diei 20 Februarii 1888,.... ac per posteriores litteras diei 1 Martii 1889,.... intelligatur concessa etiam facultas declarandi ac nunciandi legitimam prolem spuriam, forsitan a concubinariis, vigore dictæ facultatis dispensandis, susceptam, prout a S. Sede in singulis casibus particularibus dispensationum matrimonialium concedi solet; an contra pro susceptæ prolis legitimatione necesse sit novam gratiam a S. Sede postea impetrare.

"Affirmative quoad primam partem, excepta prole adulterina et prole proveniente a personis Ordine Sacro aut solemni Professione Religiosa ligatis, facto verbo cum SSmo. Quoad secundam partem provisum in prima." 8 Jul. 1903. (*Acta S. Sedis*, vol. 36, p. 118).

dispensationes a sacris Congregationibus Romanis et ab aliis Ecclesiasticis Institutis impetrandæ sint, eædem non per telegraphum, sed in scriptis petantur" (Circular of the Secretariate of State, 5 Jan. 1892: *Acta S. Sedis,* vol. 24, p. 447).

The Decree *Ne Temere* does not extend to simple priests, acting under these circumstances, the faculty of dispensing from diriment impediments, granted by the above-quoted decrees to Bishops and parish-priests.

It is to be noted that the presence of two witnesses is absolutely necessary. (Card. Gennari, *Breve Commento, ecc.*, pp. 30-31, 51).

§ 2.

"VIII. — Si contingat ut in aliqua regione parochus locive Ordinarius, aut sacerdos ab eis delegatus, coram quo matrimonium celebrari queat, haberi non possit, eaque rerum conditio a mense jam perseveret, matrimonium valide ac licite iniri potest emisso a sponsis formali consensu coram duobus testibus."

When it is impossible to obtain the presence of a priest properly qualified to assist at marriage, and this impossibility has lasted for a whole month, marriage may be validly and lawfully contracted by the simple interchange of consent in the presence of two witnesses. These conditions will probably be frequently verified in missionary countries; and a similar situation would naturally be created in times of persecution; as actually happened in France during the Great Revolution, and in Japan

in the seventeenth century. The Holy See has repeatedly declared that under such circumstances the Tridentine decree *Tametsi* does not bind, as far as the presence of the parish-priest is concerned, but the presence of two witnesses has been always required: "servata in eo quo potest forma Concilii, nempe adhibitis saltem duobus testibus" (S. Cong. Concilii, 18 Jan., 1663: *Collectanea de S. Congr. de Prop. Fide*, n. 1388: see also nn. 1386, 7).

Hitherto, however, the rule has been that the marriage might be contracted in the absence of the priest, if it was foreseen that he would not be able to be present for a month: "Quando difficilis nec tutus est accessus, et ignoratur quandonam parochus haberi possit, et prævidetur spatium saltem unius mensis a loco abfuturus, nullusque alius sit qui vices parochi suppleat, matrimonium valere absque præsentia parochi, etc." (Holy Office: 1 Jul. 1863, to the Bishop of Grass Valley: apud Ballerini-Palmieri, n. 1198): but by the new Decree, it is necessary to wait till a whole month, during which it has been impossible to obtain the services of a properly qualified priest, has expired, before proceeding with the marriage. When the month has expired, the marriage may take place in the absence of the priest, even though it is known that he will arrive shortly (Card. Gennari, op. cit., p. 32). If a priest who is not qualified to assist at marriages is available, there is no obligation to contract the marriage before him, if it is impossible to obtain delegation for him, for the decree does not impose any such obligation, and the presence of the priest would not add to the validity of the act. It would be necessary, however, if it could be done without

difficulty, to obtain delegation for the priest from the parish-priest or Ordinary, by letter or messenger (Bucceroni: *Theologia Moralis*, II, n. 1029: Gasparri, n. 1176).

It is not required that there should be the *absolute* impossibility of having a qualified priest to celebrate the marriage. Impossibility in a wide sense, so that it includes serious difficulty, physical or moral, is sufficient (Holy Office: 30 Jan. 1884, "non sine magna difficultate;" Collect. S. C. de P. F., n. 1412; see also Gasparri, n. 1172).

It has been the common opinion of theologians that the impossibility must not be limited to the particular persons who are to be married, but be general to the locality or community. The new Decree *Ne Temere,* however, makes no distinction between *common* and *particular* impossibility; and therefore in both cases the marriage would be valid (Card. Gennari, op. cit., p. 52).

The presence of two witnesses is absolutely necessary for the validity of the marriage (1).

---

(1) Of course the principle still remains valid that in the conflict of laws, the ecclesiastical law must yield to the natural law: so that, if on the one hand there is the natural right and urgent necessity of marriage, and on the other the conditions for validity required by the law of the Church are impossible of fulfilment, even as regards the presence of witnesses, the marriage will be valid and licit, though clandestine. "At cessat obligatio et matrimonium clandestinum est validum, imo et licitum, si lex in eo loco jam sit observatu impossibilis. Et quidem si per hypothesim observantia est impossibilis tum quoad præsentiam parochi, tum quoad testium præsentiam, obligatio penitus cessat. Si vero observantia est possibilis quoad præsentiam testium et impossibilis quoad præsentiam proprii

*
* *

Under certain exceptional circumstances, then, the Church permits marriage to be celebrated in the absence of the priest, her official witness. But those who are compelled to contract marriage in this manner must remember that matrimony is not a mere natural contract; but that, whenever it is validly celebrated between two Christians, whether a priest be present or not, it is always equally a Sacrament; and that therefore the contract of Christian marriage is essentially an act of religion. Much then, over and above the formal interchange of consent, is required, by reason of the dignity and sanctity of the Sacrament, from those who contract marriage under the circumstances contemplated in this article of the Decree. They must

---

sacerdotis, obligatio cessat quoad parochi præsentiam, sed urget quoad præsentiam testium, ita ut matrimonium sit irritum, nisi coram duobus saltem testibus ineatur. Hæc certissima sunt, et a Sacris Congreg. Romanis pluries tradita, quarum nonnulla documenta vide apud Benedictum XIV, *De Syn., lib. XII, cap. V, n. 5*, quibus alia addi facile possent. Ratio est quia in casu lex Tridentina opponitur juri naturali ad matrimonium; in quo conflictu hoc prævalere debet." (Gasparri, n. 1171).

Now, the Decree *Ne Temere* legislates for the case in which the qualified priest cannot be had to assist at the marriage; but it makes no provision for the other case, viz. in which it is impossible even to find two witnesses for the marriage; in fact the Decree explicitly requires in every case the presence of two witnesses. The reason is that the latter case (in which the impossibility of finding witnesses is contemplated) is not a practical one. "Impos-

bear in mind that Matrimony, as a Sacrament, is a vehicle of divine grace to their souls; that it was raised to the sacramental order and dignity by our Divine Lord in order to provide them with the special supernatural helps and graces necessary and opportune for the state of life upon which they are entering; that, in fine, it is a Sacrament of the living, and therefore requires that it be received in a state of grace.

It is therefore the duty of the contracting parties to do their best by prayer, acts of faith, hope, charity, sorrow for sin, etc., to prepare their souls and put them into the proper dispositions to receive the divine graces that are bestowed on all who approach the Sacrament worthily; and this is all the more necessary, because they are, *ex hypothesi*, deprived of the assistance of the priest, and of the opportunity of making their confession.

---

sibilitas quoad præsentiam testium," continues Cardinal Gasparri (*loc. cit.*), "vix potest verificari, cum quilibet masculus aut fœmina, usum rationis habentes, possit esse testis." Also the *Acta S. Sedis* (vol. 40, p. 574) in a note appended to one of the preliminary draughts of the Decree *Ne Temere;* "Si pro æterna salute alicujus animæ absolute necessaria esset celebratio matrimonii in extremis, permitti quidem posset ut ægrotus nuptias ineat coram unico teste vel etiam absque testibus; verum hæc matrimonii celebratio in extremis non videtur requiri absolute ad salutem."

Anyhow, such a marriage would not be celebrated according to the Decree *Ne Temere;* and therefore, to be valid and licit, the conditions ordinarily laid down by theologians, i. e. the "*doctrina communis*" of the past, antecedently to the Decree *Ne Temere*, would have to be observed, and in particular, that the impossibility was *common*, not *particular* (see Gasparri, from n. 1172, especially n. 1175).

Holy Church has not omitted to give an explicit admonition on this matter. The S. Congregation of Propaganda, in an Encyclical letter to the Bishops and Vicars Apostolic of the Far East (23rd of June, 1830), indicates the manner in which such a marriage is to be contracted; "If the missionary cannot be approached, and there is urgent necessity to celebrate the marriage, and there is no impediment, let the parents choose two witnesses, who, together with the bridegroom and bride and their relatives shall go to the church, where all kneeling shall recite in common the usual acts of faith, hope, charity and contrition, and thus the bridegroom and bride shall duly prepare themselves for contracting the marriage. Then the contracting parties, rising, shall, before the aforesaid witnesses, express aloud their present mutual consent; and after returning thanks to God, shall return home. But if they cannot go to the Church, let these directions be observed at home. Afterwards, when they have the opportunity, the newly-wedded pair and the witnesses shall present themselves before the missionary, so that he may legally certify that the marriage has been duly contracted, and in order to receive the blessing from him."

"Si missionarius adiri nequeat et ineundi matrimonii urgeat necessitas, atque aliunde nullum omnino obstet impedimentum, tali casu parentes duos testes eligant, qui, una cum sponso et sponsa eorumque propinquis ad ecclesiam se conferentes, flexis genibus, consuetos fidei, spei, charitatis, contritionis actus in communi recitent, sicque sponsus et sponsa ad contrahendum matrimonium recte se disponant. Post hæc surgentes sponsus et sponsa coram prædictis

testibus per verba de præsenti mutuum exprimant consensum, et post actas gratias Deo, domum revertantur. Si autem ad ecclesiam ire nequeant, in privatis domibus prædicta observentur. Postea vero, data opportunitate, novi conjuges et testes missionarium adeant, ut ipsi de matrimonio rite inito legitime constet, et ab eodem benedictionem accipiant" (ap. Gasparri, n. 1176).

The last sentence of this passage from the Instruction of Propaganda shows that the married couple, when they have returned home after their thanksgiving, have not yet fulfilled all the obligations incidental to the celebration of their marriage, but that the Church requires 1° that the marriage be duly certified and registered by the parish-priest; and 2° that they receive from him the nuptial blessing. The subject of registration will be dealt with in the next chapter (art. IX, § 3); and besides, my present object is to draw attention to the *religious* duties of persons who have married without the priest: so I confine my remarks here to the question of the nuptial blessing.

In order to prevent misunderstanding, I wish to say at once that I have no intention of affirming the existence of an obligation on the part of the contracting parties to have a nuptial Mass celebrated and its special benediction imparted. A distinction must be made between the blessing of the Ritual and that of the Missal. By the blessing of the Ritual are meant the religious rites and ceremonies which follow the actual contract, and which do, as a matter of fact, contain a blessing. "Aliquando ipsæ cæremoniæ Ritualis appellari solent *benedictio nuptialis*, et revera continent benedictio-

nem " (Gasparri, n. 1218). But the blessing which is given in the Nuptial Mass is properly speaking the *benedictio nuptialis*, and is sometimes distinguished from that of the Ritual by the title of *solemnis,—solemnis nuptiarum benedictio* (Gasparri, ibid).

With regard, then, to the solemn nuptial blessing of the Missal, though it used to be a common opinion among theologians that there was an obligation binding *sub levi* those who contracted marriage to receive this blessing, there now seems to be a consensus among authors that no obligation at all, in the strict sense of the term, exists. Wernz, *op. cit.*, n. 192-3; Gasparri, n. 1240; Bucceroni, II, n. 1030; D'Annibale, III, n. 464 and note 14; Lehmkuhl, II, n. 693-4; Noldin, n. 650, 3°, may be cited as examples. This view is based upon decrees both ancient and modern, but especially upon those of the Holy Office of the 31st of August, 1881, and of the S. Congregation of Rites, 9th of May, 1885, in which the Holy See does not go further than a strong recommendation and exhortation to all Catholics who contract marriage to receive the solemn blessing of the Missal. In practice, then, the parish-priest cannot insist on the reception of this blessing as a matter of obligation under pain of sin, unless in the special circumstances of the case its omission would be the cause of scandal. He can but urge that it is the mark of a good Catholic to act in conformity with the spirit of the Church and to comply with her strongly expressed desire and exhortation, to emphasize in every possible way the essentially religious and sacred character of Christian marriage, and to take advantage of all the means of grace placed at his disposal by the Church at this important epoch of his life.

But it is not so with the blessing of the Ritual, i. e. the rites and ceremonies which there accompany the essentials of the sacramental contract. For just as, when an infant has been privately baptized in danger of death, the grave obligation remains of taking it afterwards to the church, if it recovers, for the supplying of the omitted ceremonies of baptism; so also the grave precept exists of supplying the ceremonies of marriage when opportunity offers, if the marriage has been contracted validly and licitly in the absence of the priest. It is necessary, however, to make here one limitation. The parish-priest not only must not require the married couple to renew their consent to the marriage, but he must also omit the formula: *Ego conjungo vos in matrimonium in nomine Patris et Filii et Spiritus Sancti. Amen.* The S. Congregation of Propaganda issued in 1806 the following Instruction: "In the case of a marriage already validly contracted, which has only to be blessed, it will be the duty of the priest, when asked for the nuptial blessing by the married couple, to explain to them that this blessing, though useful and salutary, is not necessary for the validity and indissolubility of their marriage, and so to recite over them what is prescribed in the Roman Ritual, refraining from requiring of them the renewal of consent, and from pronouncing the words *Ego vos conjungo*, etc." (*Collectanea de Prop. Fide*, p. 571, note).

The following Decrees and Instructions of the Holy See will put the existence of this precept beyond question. "*Ex Instr. S. C. S. Officii*, 6 Julii, 1817—(Ad Præf. Mission. Martinicæ, Gua-

dalupæ, etc.)... In medium afferemus theologorum, canonistarum opinionem, multiplices S. C. Concilii resolutiones, recentem denique Pii fel. rec. Papæ VI decisionem, in ejus epistola in forma Brevis, Episcopo Lucionensi in Galliis directa, die 28 Maii 1793 quæ incipit *Perlectæ sunt*, § 3 in quibus ponitur legem tridentinam, quoad suum effectum, suspensam remanere etiam quoad illa loca in quibus fuit publicata, atque in observantia servata, quoties aut non amplius observari potest, aut non potest observari quia pericula et obstacula insuperabilia aut superatu difficilia offendantur: idque accidit, quando aut parochi desunt, aut facilis ad eosdem et tutus non patet accessus.

" Hisce tamen in casibus conjugatorum dispositio se præsentandi, cum primum licuerit, proprio parocho, seu vices ejus obtinenti, ut nuptialem benedictionem consequantur, laudari meretur, non quidem ea de causa quod hæc pro validitate ipsorum matrimonii, jam valide in ejus absentia contracti, necessaria sit, sed potius, ut gratias et peculiaria auxilia sacro huic ritui adnexa, consequantur, atque, statim ac valent, eoque modo quo valent, *satisfaciant Ecclesiæ præcepto* (Italics mine), implorandi a proprio sacerdote earum nuptiarum benedictionem quæ sine ipso jam antea initæ valide fuerunt.

" Neque supervacaneum erit hic memorare etiam ante Tridentini irrita matrimonia clandestina reddentis Decretum, matrimoniorum sine parocho et testibus celebrationem illicitam atque peccato obnoxiam fuisse. Id enim perspicue non solum ex ipso Tridentini Decreto (de reform. Matrim. Sess. XXIV) colligitur, verum etiam a quamplurimis priorum Patrum Ecclesiæque Doctorum testimoniis, a qui-

busdam Conciliorum generalium, provincialiumque sanctionibus, atque ab illis præsertim Conciliorum Lateranensium III et IV nec non Londinensis et Toletani; a responsis Nicolai I ad consulta Bulgarorum, etc. Quamobrem illis in locis, ad quæ Tridentini lex haud extenditur, seu quia minime publicata fuerit, aut in desuetudinem abierit, vel quod observatu impossibilis aut difficilis fuerit, matrimonium quidem, non servata conciliari forma, irritum et nullum non est, illicitum tamen atque culpabile erit ob actualem Ecclesiæ legis (quando hæc facile servari potest) violationem, aut ob actualem ad eam violandam comparationem, respectu ad eos qui ipsius observandæ, ubi opportunitas aderit, animum minime habent.

"Hinc factum est ut S. hæc Congregatio in instructione quam anno 1780 ad Vicarium Apostolicum Sutchuen. transmisit, dum consensus renovationem ante proprium sacerdotem haud necessariam esse declaravit, quoties matrimonium extra ejus præsentiam valide contractum fuisset, simul tamen adjecerit 'voluisse Sanctitatem Suam adhortandos esse fideles ut missionario reduci se sistant, ab eoque benedictionem petant, prævia tamen declaratione a missionario facienda, benedictionem hujusmodi ad matrimonii validitatem neutiquam pertinere' (1).

---

(1) Hence when the Holy See *exhorts*, it does not necessarily follow that it does not impose an obligation in conscience; for the Church *exhorts* her children to obey her precepts as well as to do good works that are optional. The existence of the precept must, indeed, be clearly proved, and the use of the word *hortari* is not sufficient

"Non itaque fundamento caret opinio P. Francisci a Brenno (Manual. Miss., lib. 3, cap. 5, q. 29, § 4), qui eos haud absolutionis capaces esse propugnat qui nuptias coram parocho, ad accipiendam ab ipso nuptialem benedictionem, inire recusant, licet sine illo, illiusque benedictione valide contrahere valeant, adeoque tali pacto se prave ad recipiendam sacramentalem absolutionem dispositos ostendunt ob eam quam gerunt minime obtemperandi Ecclesiæ voluntati, et quidem, ut ille ait, *in re gravissima* (Italics of the Decree), unde concludit 'Nolentes autem Ecclesiæ obtemperare, nedum sacramentali absolutione incapaces sunt, utpote prava affecti voluntate, verum etiam, ut ethnici et publicani ab Ecclesia merentur omnino repelli, juxta Christi Domini oraculum Matth. XVIII'." (Collectanea S. Congr. de Prop. Fide, n. 1400).

"*Instructio S. C. de Prop. Fide*... ad Episcopos Vicarios Apost. in Imperio Sinarum, etc. 14 Jan. 1821:... Contrahentes (coram duobus testibus sine parocho in casu impossibilitatis) ne sacramenti dignitas vilescat, *obligentur lege* sistendi se coram missionario vel parocho quandocumque reduci, ut rite ab eo benedictionem accipiant. Missionarius autem vel parochus redux, quando sibi de consensu conjugum constiterit, antequam conjuges benedicat, eos condocefaciat hujusmodi benedictionem ad ritum unice, non ad validitatem pertinere conjugii, ac propterea non committat ille ut rursus consensio per nova verba exprimatur" (apud Gasparri, op. cit., II, p. 226, and 472 seqq.).

---

proof of this; but, on the other hand, its use cannot be legitimately construed into a positive argument against the existence of the precept.

From the Instruction of Propaganda, 23rd of June, 1830, quoted above (p. 232): "Data opportunitate, novi conjuges et testes missionarium adeant, ut ipsi de matrimonio rite inito legitime constet, et ab eodem benedictionem accipiant."

Finally, "*Ex Litt. S. C. de Prop. Fide*, 29 Febr. 1836. (Ad Vic. Gen. Nanking.)... Non ignoras in instructione super matrimoniis, quæ in istis regionibus contrahuntur absente missionario, *præcipi conjugibus, ut cum missionarius ad eos visitandos accesserit, coram eo se sistant, ut benedictionem accipiant nuptiarum* (italics mine), quamvis eæ jam valide contractæ censeantur; ob quam causam abstinere debent a consensus renovatione" (*Collectanea de P. F.*, n. 1545).

Cardinal Gasparri is therefore abundantly justified in concluding: "Ex dictis clarum est, inito valide matrimonio, præceptum grave manere sponsos petendi hanc Ritualis benedictionem. Si quandoque dicitur *hortandos esse fideles*, hæc est hortatio ad præceptum implendum, uti ex declarationibus allatis constat. Hæc vera sunt non modo de matrimonio, defectu parochi coram testibus contracto, sed in genere de matrimoniis validis clandestinis" (n. 1227). But when the Decree *Ne Temere* comes into operation, no clandestine marriages between Catholics will be valid, except those contracted under the conditions of articles VII and VIII of the Decree. But the last sentence I have quoted from Cardinal Gasparri, is of importance for clandestine marriages contracted under the discipline of the past, in places where the Tridentine law had not been promulgated.

CHAPTER VI.

Registration.

"X. — § 1. Celebrato matrimonio, parochus, vel qui ejus vices gerit, statim describat in libro matrimoniorum nomina conjugum ac testium, locum et diem celebrati matrimonii, atque alia, juxta modum in libris ritualis vel a proprio Ordinario præscriptum; idque licet alius sacerdos vel a se vel ab Ordinario delegatus matrimonio adstiterit.

"§ 2. Præterea parochus in libro quoque baptizatorum adnotet, conjugem tali die in sua parochia matrimonium contraxisse. Quod si conjux alibi baptizatus fuerit, matrimonii parochus notitiam initi contractus ad parochum baptismi sive per se, sive per curiam episcopalem transmittat, ut matrimonium in baptismi librum referatur.

"§ 3. Quoties matrimonium ad normam n. VII aut VIII contrahitur, sacerdos in priori casu, testes in altero, tenentur in solidum cum contrahentibus curare, ut initum conjugium in præscriptis libris quam primum adnotetur."

§ 1.

The first paragraph of this article renews the precept of the Council of Trent (sess. 24, cap. 1, *de Reform. Matrim.*) and of the Roman Ritual tit. VII, *de Sacramento Matrimonii*, cap. 2, n. 6), regarding the registration of marriages.

Every parish-priest is bound by the grave obli-

gation of having a marriage register for his parish; and in some places this obligation is enforced by the enactment of the penalty of suspension for contravention of the precept. Thus the First Provincial Council of Australia decreed: "Unusquisque missionarius sub pœna suspensionis tenetur servare aut habere in missione librum, in quo notanda sunt nomina omnium qui matrimonio junguntur, et nomina testium cum die, mense et anno, quibus celebratæ sunt nuptiæ" (*Collectio Lacensis Recentiorum Conciliorum*, tom. 3, col. 1054). And the register must be a *book:* it must not consist of loose sheets of paper, for no legal authority could be claimed for such documents, and they could not be admitted as legal evidence of marriage (Gasparri, n. 1277).

The parish-priest must not only *possess* a marriage register. He is also bound *sub gravi* to enter in the register all the marriages that take place in his parish, so that the omission of even one marriage through culpable negligence is grave matter. For not only is there in such omission a serious breach of precept, but it is also a grave injustice done to the contracting parties. Gasparri (*loc. cit.*) quotes Baruffaldo to the following effect: "Puniendus est (parochus) gravi mulcta, quia, præter peccatum mortale commissum in re gravis momenti ob spretum decretum Concilii..., infert grave damnum tertio, et tenetur ad damna et interesse, quæ parochianis ex tali negligentia et respective omissione obvenirent...; atque ideo parochiani habent actionem contra parochum ex quasi contractu, qui dum acceptavit officium cum honoribus et oneribus, quasi sit mercede conductus, tenetur (*Comm.*

in Rit. Rom., tit. 42, n. 82)." Nor is the obligation at all diminished by the fact that a register of marriages is kept by the civil authority (Gasparri, *loc. cit.*).

The duty and obligation of keeping the register and making the entries in it, are the parish-priest's and his only. Even though he himself does not assist at the marriage, but a priest delegated either by the Ordinary or by the parish-priest himself, it is to be registered, not by the delegate, but by the parish-priest. It is true that the words of the Decree are: "parochus, *vel qui ejus vices gerit*;" but this latter clause does not refer to the delegate, as is clear from the context, but to the *acting-parish-priest*, who is governing the parish and fulfilling all the parochial duties during the prolonged absence, or illness, etc., of the incumbent, or to a priest who habitually holds full faculties for dealing with the matrimonial business of the parish, whether he be a coadjutor who has been appointed *ad universitatem causarum*, or simply *ad omnia negotia matrimonialia*, as are the senior coadjutors of Paris. If therefore the priest who assists at a marriage holds any one of these positions, the obligation falls upon him of fulfilling the law with regard to registration: but such a priest is, as we have seen, *parochus*, within the meaning of the matrimonial law. He ought, according to Cardinal Gasparri, to mention that he does this by special authority of the parish-priest: — "Quod si parochus senio confectus aut morbo detentus scribere nequeat, illius coadjutor vel vicarius, qui regulariter illius vices supplet, matrimonium describet; sed in ipso libro declaret se

id facere ex speciali commissione parochi legitime impediti" (n. 1279).

This duty of the parish-priest is thus expressed in the Roman Ritual (*loc. cit.*): "Peractis omnibus, Parochus manu sua describat in libro Matrimoniorum nomina conjugum, et testium, et alia juxta formulam præscriptam; idque, licet alius Sacerdos, vel a se. vel ab Ordinario delegatus, Matrimonium celebraverit." Comparison will at once show that this rubric has served as the model for the construction of this first paragraph of article IX of the Decree *Ne Temere*. The rubric is copied into the English Ritual at the end of the Marriage Rite; but I may be permitted to point out that the formula to be used for the registration of marriages, given at the end of the English Ritual (in my copy, p. 242), is not compatible either with the rubric or with this paragraph of the Decree *Ne Temere*, for it requires that in every case the marriage be registered by the priest who assists at it. The formula is follows: "Anno . . . . . die . . . mensis . . . . , Ego N. N. in Matrimonio conjunxi . . . . . (*talis loci*) filium . . . . . et . . . . . (*talis loci*) filiam . . . . .

Præsentibus testibus { . . . . . (*talis loci*) / . . . . . (*talis loci*)

N. N. Rector Miss.s *vel* Miss.s Apos.s *vel* Miss.s Coad."

But the Roman Ritual (tit. X, cap. 5) gives the formulas for registration, arranged for every variation of the circumstances, and all to be entered by the parish-priest himself.

The new Decree also enjoins that the marriage be registered immediately after it has been celebrated. "Laudabilis igitur mos est, quo parochi

librum tenent in sacrario, ita ut vix ac matrimonium celebratum sit, conjuges pro facienda inscriptione illuc accedant: et, e contrario, vituperanda est illorum praxis, qui matrimonium solent interim scribere in pagellis volantibus, animo deinde illas transcribendi in libro" (Gasparri, n. 1279). It is obvious that if the registration is deferred, there is danger of its total omission, or, at any rate, of an inaccurate entry.

The parish-priest, then, must register every marriage that is celebrated in his parish, whether the contracting parties be his subjects or not. The particulars to be recorded are the names of the contracting parties and of the witnesses, the place and date of the marriage, and the name of the priest who officiates, whether he be the parish-priest himself or a delegate. Special care should be taken to note the fact of delegation. It was even proposed in the preparatory Consultations of the S. Congregation of the Council, to make explicit mention of this point in the decree (see *Acta S. Sedis*, vol. 40, p. 569, note 3). However the directions of the Roman Ritual are sufficiently precise: — "Si alteri Presbytero ab Ordinario vel a Parocho ipso facultas facta sit conjungendi aliquos, id in libro proprii Parochi sic adnotetur ipsius Parochi manu: *N.* Presbyter *vel* Capellanus Ecclesiæ *N.*, de licentia reverendissimi Episcopi *N.*, *seu N.* ejus Vicarii loci *N.*, *aut* mea, quæ penes me extat, *N.* filium *N.* et *N.* etc. in Matrimonium conjunxit, etc. *ut supra*. Et ego *N.*, Parochus *N.*, subscripsi et testor, rem ita se habere."

Moreover, if neither of the contracting parties is domiciled or has resided for a month in his

parish, the parish-priest cannot licitly marry them without the permission of the *parochus proprius* of one of them, unless the case is one of grave necessity (Decree, art. V, § 3). The fact that the required permission has been obtained should therefore be noted in the register; or, if grave necessity has excused from this permission, both the fact and its cause should be mentioned.

Dispensations from impediments should be recorded; and if a marriage is afterwards declared by competent authority to be invalid, an annotation should be made in the register to that effect.

The parish-priest should register a marriage, even though it should be celebrated outside his parish, if the bride has her domicile therein. For he is then her *parochus proprius*, and, as such, has the prior right to officiate at her marriage (art. V, § 5). This consideration furnishes two reasons why the marriage should be entered in the register of his parish.—1° It is to be supposed that his permission was obtained for the celebration of the marriage elsewhere, according to art. V, § 3; and this ought to be recorded by the the grantor as well as the grantee. 2° If a certificate of the marriage is afterwards required, the first place in which it will be sought, will be the parish in which the bride resided at the time of her marriage, if there is no distinct recollection of the place where the marriage was actually celebrated.

Finally, the form of the registration should be that prescribed by the Ritual or by the Ordinary, and all instructions of the Ordinary as to registration are to be strictly observed.

§ 2.

An entirely new obligation is imposed on the parish-priest by the second paragraph of this article of the Decree. He is directed to note the fact of the marriage in his baptismal register, if either or both of the contracting parties were baptized in his parish, the note to be appended, of course, to the record of the particular baptism or baptisms. If either or both received baptism elsewhere, it will be the duty of the parish-priest to forward a notification of the marriage to the parish-priest of the place of the baptism, in order that it may be entered in the same manner in his baptismal register. The notification may be sent to the parish-priest, either directly or through the episcopal Curia; and as the Decree does not specify which Curia is to be the medium, the parish-priest who forwards the notice, may send it either through the Curia of his own diocese, or through that of the diocese of the recipient(1). The parish-priest who assists at the marriage must therefore ascertain from the contracting parties where they were baptized, in order that he may fulfil his obligation. The entry in the register may be made by a marginal note as follows: — "*Ipse* (or *Ipsa*) *die* ..... *mensis* ..... *anni* ..... *matrimonium contraxit cum* ..... *in loco* .....;" and it should be attested by the signature of the parish-priest (Card. Gennari, op. cit., pag. 34).

(1) This will, no doubt, be made the subject of diocesan legislation.

This injunction will unquestionably be regarded as increasing the burdens of the parish-priest. In some cases it will no doubt be difficult to obtain the information, in others it will be even impossible. But where there is real impossibility, obligation ceases. The obligation in question, however, is a grave one, as is the end which the law has in view in imposing it (Card. Gennari, *loc. cit.*). This I think I shall have no difficulty in showing.

As we have already seen (chap. 2, § 2), the Council of Trent, when it invalidated clandestine marriages and appointed a special form for the valid celebration of matrimony, was chiefly concerned, in determining the precise conditions of solemnity to be required for validity, to provide for "the security and the stability of the proof" of the marriage, without unduly restricting liberty of contract. The Council therefore decreed that marriage, to be valid, must take place in the presence of the parish-priest as the *testis auctorizabilis pro Ecclesia*, the Church's official witness, and two other witnesses: thus securing both the legal publicity of the marriage and its celebration *in facie Ecclesiæ*. Furthermore, to ensure the permanence, the "stability" of the proof, the decree (sess. 24, c. 1 *de Reform. Matrim.*) orders the parish-priest to keep a register of the marriages contracted in his presence: "Habeat parochus librum, in quo conjugum et testium nomina, diemque et locum contracti matrimonii describat, quem diligenter apud se custodiat."

The subsequent canonical jurisprudence which gradually developed in the application to practice of the new Tridentine legislation, placed a restrictive

interpretation on the decree against clandestinity, by requiring that the parish-priest whose presence was necessary for the validity of the marriage, should be the *parochus proprius*, i. e. the parish-priest of the domicile or quasi-domicile of one or other of the contracting parties. This condition was unquestionably even more effective than that of Trent in securing the publicity of marriages; but it was found that it had the disadvantage of sometimes producing the contrary effect to that which it was designed to bring about. For marriages which were contracted both publicly and *in facie Ecclesiæ*, were invalid because the parish-priest did not possess parochial jurisdiction over either of the contracting parties. In modern times, this disadvantage reached the proportions of a real evil, for a spirit of unrest, engendered partly by necessity and partly by inclination, and fostered by "the ever increasing facility and celerity of intercommunication," to use the words of the Preamble of the Decree *Ne Temere*, has seized upon the population. There has been, and still continues, a steady movement from the country to the large cities, and from one country and even continent to another. It was therefore frequently difficult to know who was the *parochus proprius*, the parish-priest duly qualified to assist validly at a marriage, and it was to be feared, as the Cardinal Archbishop of Breslau reported to the Holy See, that sometimes invalid marriages were contracted. The S. Congregation of the Council, therefore, after mature deliberation, decided to return to the Tridentine discipline (*Acta S. Sedis*, vol. 40, p. 531), introducing, however, a few accidental modifications, de-

manded by the end and purpose of the law in view of the altered circumstances of the times.

For the end of the law remains always the same, viz, to prevent secret or clandestine marriages, to ensure the publicity of the contract. The substance of the law therefore remains unchanged; —the contract must be made before the local parish-priest and two witnesses, and thus the essential publicity, or, in other words, the capability of proof on the testimony of trustworthy witnesses, was secured. But as the witnesses are not always personally available, and, at any rate, cannot live for ever, it was desirable to have a permanent record of the marriage, in order that its publicity might be still further ensured in practice.

Hence the obligation of keeping a register of marriages was imposed by Trent; but as it was something over and above what was absolutely necessary for the *essential* publicity of the marriage, this was not made a condition of validity, but was imposed as an obligation in conscience.

But nowadays, on account of the fluctuations of the population mentioned above, this provision hardly suffices to secure that practical publicity of marriage which is so desirable and necessary. It would not be very difficult to conceal effectually a marriage that has been celebrated in a remote district where the contracting parties were unknown, if the marriage were registered only in the parish where it took place. Thus the Holy See, while closing the door against clandestine marriages, would be leaving the wicket open through which the evils of clandestinity deplored by Trent might once more enter the Church. The preventive which the S. Con-

gregation has found for this danger is as effectual and as simple a one as it is possible to obtain in the circumstances of the case, though no doubt it will involve a certain amount of trouble for the parish-priests. The advantage of having a record of the marriage in the baptismal register is obvious; for in the future it will be sufficient to call for the baptismal certificate in order to have proof of the marriage or the *status liber* of anyone (although it must not be understood that the baptismal certificate is to take the place of the ordinary process for proving the *status liber*, for while the presence of the record of marriage in the baptismal register is proof positive that the marriage has taken place, its absence is not as convincing an argument in favour of the freedom of the person concerned).

M. l'Abbé Boudinhon (*Le Mariage et Les Fiançailles*, n. 64) thus briefly explains the object of this clause of the Decree: — "It is prescribed that henceforth the marriage must be notified to the pastor of the parish where each of the contracting parties was baptized, in order that a record of it may be added to the register of baptism. The reason of this measure is evident: the object is to prevent divorced persons and others from fraudulently contracting a second marriage *in facie Ecclesiæ*. If one reflects that in many countries, in France particularly, the process of the *status liber* properly so called, as prescribed by the decree of the Holy Office of the 21st of August, 1670, is not carried out; if one recalls the great number of attempts made by divorced persons, especially in large cities, to contract a second marriage ecclesiastically; the utility of this new measure will be

readily admitted. But in order that it may have its effect, it is absolutely necessary to exact at the marriage a baptismal certificate of recent date. What, for instance, would be the use of a baptismal certificate given for the occasion of first Communion, as a testimony of the absence of a previous marriage?" (The writer suggests that no baptismal certificate should be accepted that is dated more than three months previous to the marriage).

The idea of recording the fact of marriage in the baptismal register is not a new one. The civil codes of the majority of countries impose the same obligation as regards civil marriage. Thus in Italy the *Regio Decreto per l'ordinamento dello stato civile*, 15 Nov., 1865, in the appendix to the Civil Code, tit. V, on registers of birth, art. 54, prescribes that "on the margin of the acts of birth, he will make a note of marriages contracted" (ap. Card. Gennari, *op. cit.*, p. 34 and note).

It is repugnant to our idea of liberty that a functionary should be employed in noting down all the minute details of our career, and that in a certain *bureau* there should lie a *dossier* which would be of great interest to our biographer if we ever had one. But the interests and the good government of society require that the events which are of supreme importance in the lives of its members, and especially those which are of practical and even vital consequence to other members of the same society (and both baptism and marriage belong to this category), should be on record, and that they should be readily available; and for this purpose it is of the greatest advantage that they be found together. This is not a restriction of true liberty.

I conclude with the following very apposite comment of a writer in the American Ecclesiastical Review (Oct. 1907, pp. 430-1): — "This obligation will probably meet with some demurring on the part of those who are not accustomed to place much importance on official detail. The easy methods which pastoral life is apt to foster, make us forget that an exact entry system in an organized society, such as the diocesan administration represents in the Church, is of immense service both as a discipline and as a check on abuses of carelessness or forgetfulness. We need an improved curial system, to allow better episcopal supervision of and insight into parish affairs... If we look a moment into the system of supervision which the Civil Service authorities and the War Department exercise in maintaining proper control over and order in their affairs, we may realize what a perfectly equipped diocesan office means. If the clergy exercised a tithe of the care (and the Catholic system of local discipline and interdiocesan communication would facilitate it so much) which we find taken in any other successful organisations, whether secular or religious, we should have easy work in extending the glory and power of the Catholic Church."

§ 3.

When a marriage has been validly and lawfully contracted without the assistance of a priest duly qualified for the celebration of matrimony, viz., in the exceptional circumstances of articles VII and VIII, there remains the grave obligation of notify-

ing the fact of the marriage to the parish-priest as soon as possible, in order that it may be registered in the marriage register of the parish where the marriage has taken place, and in the baptismal register of the parish or parishes where the contracting parties were baptized. If the marriage has been celebrated in danger of death, according to article VII. the obligation of having it registered is incumbent upon the priest who assists at it, *in solidum* with the contracting parties; if the marriage has taken place under the rules of article VIII, in the prolonged absence of the parish-priest, the obligation rests upon the witnesses, again *in solidum* with the contracting parties. The phrase *in solidum* means that the full obligation falls upon all those mentioned, so that if one fails to do his duty, another is bound equally to do it in his stead. This implies that there is a certain order in the incidence of the obligation; and if the marriage is one that has taken place in danger of death, under article VII, the duty of seeing that the marriage is registered belongs primarily to the priest who assists, and if he fails, then to the contracting parties. In the case of a marriage celebrated under article VIII, the obligation falls first upon the witnesses, and, if they neglect it, upon the contracting parties in the second place.

This obligation is not a new one, for even when a marriage takes place under these exceptional circumstances, the common law must be obeyed as far as is possible, as we have seen under art. VIII. Hence, even in these cases, the obligation, which is a grave one according to the common law (see § 1 of this article), of having the marriage regis-

tered when it becomes feasible, has always existed. Nor is an explicit declaration of the Holy See wanting; for the S. Congregation of Propaganda, in its Instruction to the Bishops and Vicars Apostolic of China, etc., 23rd of June, 1830, directed as follows: — "Postea, data opportunitate, novi conjuges et testes missionarium adeant, ut ipsi de matrimonio rite inito legitime constet." In one respect the new regulation is less onerous than that of Propaganda just quoted, which requires both the contracting parties and the witnesses to present themselves in a body before the parish-priest, while the new law imposes the obligation *in solidum*, so that it is sufficient if only one person informs the parish-priest of the marriage that has taken place. But since the married couple are bound to present themselves before the parish-priest, as soon as they can find a convenient opportunity, for the supplying of the marriage ceremonies, this will be the proper and natural occasion for fulfilling the obligation of registration, as the Instruction of Propaganda just quoted intimates; for the full passage of which I cited only the first part, is as follows: — "Postea, data opportunitate, novi conjuges et testes missionarium adeant, ut ipsi de matrimonio rite inito legitime constet, et ab eodem benedictionem accipiant."

With regard to the obligation of seeing that the marriage is entered in the *baptismal* register, it seems to me that, even though the contracting parties were baptized elsewhere, the person whose duty it is to attend to the registration has fulfilled his obligation, if he has notified the local parish-priest of the marriage, and given him all the necessary

information, including that of the place of baptism of the contracting parties. In other words, it is not the business of an unofficial witness or of one of the contracting parties to forward a notification of the marriage to the parish-priest of the place of baptism, if this is distinct from the parish where the marriage has taken place. This is the duty of the parish-priest, according to § 2 of this article. Such notification must be sent by an official and properly authenticated document. If it were permitted to accept the notice forwarded in an unofficial way and by unofficial persons, the door would be opened to the possibility of great abuse.

CHAPTER VII.

Penalties.

"X. — Parochi qui heic hactenus præscripta violaverint, ab Ordinariis pro modo et gravitate culpæ puniantur. Et insuper si alicujus matrimonio adstiterint contra præscriptum § 2[i] et 3[i] num. V, emolumenta *stolæ* sua ne faciant, sed proprio contrahentium parocho remittant."

This article treats of the penalties incurred by the parish-priest who contravenes the new marriage law in any of its provisions. The quality and severity of the punishment is left to the discretion of the Ordinary, but it must be proportioned to the gravity of the offence. There is only one penalty specified, viz. that incurred for a breach of art. V, § 2 and 3, when, that is to say, a parish-priest assists at the marriage of persons not his subjects without the permission of the *parochus proprius*, and without the excuse of grave necessity.

By the term "*parish-priest*" is meant all who have full powers to assist at marriages, whether they are the actual pastors, or temporary substitutes, or coadjutors who have been appointed with the plenitude of the parochial ministry, or with full powers for assisting at marriages.

All the penalties, then, to be inflicted for infringements of the marriage law are *ferendæ sententiæ*, except the one mentioned above, viz. the loss of

the stole-fees for a breach of art. V, § 2 and 3; and it is to be noted that this is in addition to any punishment the Ordinary may think fit to inflict: — "Et *insuper,* etc."

M. l'Abbé Boundinhon, in his commentary on the Decree *Ne Temere* (*Le Mariage et Les Fiançailles*, n. 95), considers that this is not a penalty, but a regulation of justice and administration. He says: "The decree does not put forward this act of restitution as a penal sanction so much as a regulation of justice and of good administration: it does not say: 'They who have *violated* the prescription of art. V, § 2 and 3;' it says: 'They who have assisted at a marriage contrary to what is prescribed in art. V, § 2 and 3.' Now, if you re-read § 3, you will see that the grave necessity there mentioned excuses the parish-priest for not having asked the permission of the *parochus proprius;* but such a marriage is no less contrary to the rights of the *parochus proprius*, although not culpably so, so that if the priest had been informed sooner, he would have had to refuse to proceed with the marriage, or to obtain the permission of the *parochus proprius* who would be acting perfectly within his right in declining to give it. This omission, even though not culpable, involves the material reparation of the restitution of the stole fees."

In reply to this, it must be said that: 1° it is perfectly obvious and manifest that the loss of the stole-fees is intended to be a penalty for an infringement of the law, and primarily so; though no doubt it is, in the second place, an act of justice (see Card. Gennari, op cit., pp, 35-6, 54); 2° If you re-read

§ 3 of art. V, you will see that it does not excuse the parish-priest for not *having asked* permission; but it excuses him from *asking* permission, because under the circumstances of grave necessity he does not need it; which is a very different thing. Hence the parish-priest who in a case of grave necessity marries persons not subject to him without the permission of their parish-priest, is not acting contrary to the prescription of art. V, § 3, but in perfect accordance with it. Consequently, he is in no way bound, by this article of the Decree, to make restitution of the stole-fees; 3° The author I have quoted, confuses "contrary to the prescription of art. V, § 3," with "contrary to the rights of the *parochus proprius*." The question is: what are the rights of the *parochus proprius?* If you answer that he has a right to the stole-fees, you are begging the question. It is true that according to the discipline of the past, the *parochus proprius* was always entitled to the stole-fees, even if he gave permission to another priest to assist at the marriage, and in another parish. "Si sponsi ad diversam parochiam pertinent, jura pro assistentia matrimonio pertinent ad parochum sponsæ, qui assistere ex receptis moribus (now by legal right) solet: et si parochus sponsos ad parochum sponsi vel ad alium sacerdotem, juxta eorum votum, dimittit, jura temporalia sarta tectaque habere debet, nisi loci consuetudo alius ferat" (Gasparri, n. 1286). Hence, according to this discipline the local parish-priest would be just as much obliged to hand over the stole fees to the *parochus proprius*, if he acted with the latter's full permission, as if he assisted at the marriage without permission in a case of grave

necessity or even without any special necessity at all. But if he assisted at the marriage with the permission of the *parochus proprius*, it will not be disputed that then at least, he is not contravening the prescription of art. V, § 2 and 3. And if he has to pay over the fees even then, what becomes of the provision of the new Decree that the fees are to be surrendered when its prescription is infringed? This clause would become utterly meaningless.

The true force of the clause seems to be that whenever the local parish-priest acts *licitly* in assisting at a marriage, the *parochus proprius* has no claim upon the stole-fees. Hence if the former assists without permission in a case of grave necessity, since he is acting licitly and according to the letter of the law, he does not incur the penalty here prescribed. It will follow from this that the Decree *Ne Temere* reforms the discipline as regards the temporal rights of the *parochus proprius* arising from the marriages of his subjects.

Another question to be answered is: Are the penalties of the Tridentine discipline abrogated by this article of the Decree, or will they still remain in force?

These penalties are two, both contained in the Decree *Tametsi* (sess. 24, cap. 1 *de Reform. Matrim.*). After the clause annulling all clandestine marriages and prescribing the form necessary for the validity of matrimony, the Council commands Ordinaries to punish severely parish-priests and other priests who assist at marriages without the requisite number of witnesses, also witnesses who are present at a (clandestine) contract of marriage

without a priest, and finally the contracting parties themselves: "Parochum vel alium sacerdotem, qui cum minore testium numero, et testes, qui sine parocho vel sacerdote hujusmodi contractui interfuerint, necnon ipsos contrahentes graviter arbitrio Ordinarii puniri præcipit." Secondly, it is decreed that the *parochus proprius* alone has the right to give the nuptial blessing, and if any other priest, whether parish-priest or not, secular or regular, presumes to "*join in marriage or to give the blessing*" without permission, he incurs suspension *ipso jure*, and can be absolved only by the Ordinary of the parish-priest whose rights he has invaded. "Si quis parochus, vel alius sacerdos, sive regularis, sive sæcularis sit,... alterius parochiæ sponsos sine illorum parochi licentia matrimonio conjungere aut benedicere ausus fuerit, ipso jure tamdiu suspensus maneat, quamdiu ab Ordinario ejus parochi, qui matrimonio interesse debebat, seu a quo benedictio suscipienda erat, absolvatur."

As regards the first penalty, which is wholly *ferendæ sententiæ* and at the discretion of the Ordinary, it is renewed by the first part of this article of the Decree *Ne Temere,* as far as regards the parish-priests. With respect to the witnesses and the contracting parties who wilfully break the law, and who knowingly commit so serious an offence against the dignity and sanctity of the Sacrament, they certainly deserve punishment, and are subject to the coercitive authority of the Ordinary; but I believe that technically this penal enactment of Trent is repealed by the Decree *Ne Temere* (see below).

The practical question is as to the abrogation

or otherwise of the second penalty inflicted by Trent, viz., the suspension *ipso jure* for usurping the rights of the *parochus proprius*.

M. Boudinhon thinks that it is still in force. "There is nothing to warrant the supposition that it has been abrogated; the decree contains no abrogation either explicit or implicit" (*op. cit.*, n. 92).

It is true that there is no explicit abrogation. But it will not be difficult to show that there is an implicit one. For 1° the Decree *Ne Temere* imposes a new penalty for this very offence, viz., the usurpation of the right of the *parochus proprius*, as expressed in art. V, § 2 and 3: and with this one exception every other punishment of a breach of the law, whether the offence be against this article or any other, is *ferendæ sententiæ* and at the discretion of the Ordinary. If I am told that this restitution of the stole-fees is not really a penalty, then I reply that even if it were not (though I have shown that it is), it would not follow that the suspension *ipso jure* remained in force, but only that under the Decree *Ne Temere* there is not a single penalty to be incurred *ipso facto* or *ipso jure*, and that all without exception are *ferendæ sententiæ*. The clause "Parish-priests who violate the rules thus far laid down are to be punished by their Ordinaries according to the nature and gravity of their offence," clearly excludes all punishments *latæ sententiæ*, unless an exception is explicitly made; and there is just the one exception, viz. the loss of the stole-fees for breach of art. V, § 2 and 3.

2° Cardinal Gennari, himself a member of the S. Congregation of the Council, says (*op. cit.*, pp. 53-4): "The ancient discipline fulminated suspension *ipso*

facto against the parish-priest or any other priest who presumed to assist at the marriage of persons belonging to another parish, without the permission of their parish-priest.—*The new discipline has removed this censure (ha tolta questa censura)*, and instead *punishes* the parish-priest who is guilty of this fault, by giving to the parish-priest of the contracting parties the stole-dues." (Italics mine).

3° There is another reason which is more universal in its application, and embraces both the penal clauses of the Tridentine decree, and all who are indicated in them. For these clauses of the Decree *Tametsi* are not in force in any of those localities where the Decree has not been promulgated; nor will they begin to have force in those places, when the Decree *Ne Temere* comes into operation; for the promulgation of the *Ne Temere* is not the promulgation of the *Tametsi*, and the *Ne Temere* has its own special sanctions. Hence it would follow, if the penal clauses of the *Tametsi* remained valid after the *Ne Temere* came into force, that while the law itself was uniform throughout the Church, the penalties would differ in different places according as the Decree *Tametsi* had been published therein or not. This is surely against the mind of the Church, which is, explicitly, to obtain uniformity, and in its new legislation has included a clause treating of the sanctions of the law. It is also contrary to equity that the same offence should be punished by penalties so widely different, the difference arising only from the accidental circumstance of the locality in which the law was contravened. However, of one point at least there can be no doubt, viz., that in those places

where the Decree *Tametsi* has not been published, these penal clauses will not be binding.

Finally the excommunication *ipso jure* incurred by regulars *(cap. 1 de privilegiis V. 7 in Clem.).* for solemnizing marriage without the permission of the parish-priest, was removed by the Council of Trent, at least wherever the Decree *Tametsi* was promulgated; but it was certainly and universally removed by the Constitution *Apostolicæ Sedis* of Pius IX an. 1869.

In case of a contravention of art. V, § 2 and 3, the parish-priest to whom the stole-fees are due will ordinarily be the parish-priest of the bride.

The various questions that may arise with regard to the stole-fees in the case of marriage celebrated with permission by a parish-priest who has not parochial jurisdiction over the contracting parties, may well be regulated by synodal decree or decree of the Ordinary; and they may also be made a matter of private arrangement between the parish-priests.

CHAPTER VIII.

The Subjects of the Law.

"XI.—§ 1. Statutis superius legibus tenentur omnes in catholica Ecclesia baptizati et ad eam ex hæresi aut schismate conversi (licet sive hi, sive illi ab eadem postea defecerint), quoties inter se sponsalia vel matrimonium ineant.

"§ 2. Vigent quoque pro iisdem de quibus supra catholicis, si cum acatholicis sive baptizatis, sive non baptizatis, etiam post obtentam dispensationem ab impedimento mixtæ religionis vel disparitatis cultus sponsalia vel matrimonium contrahunt; nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum.

"§ 3. Acatholici sive baptizati sive non baptizati, si inter se contrahunt, nullibi ligantur ad catholicam sponsalium vel matrimonii formam servandam."

One effect of the Sacrament of Baptism, according to the teaching of the Church, is to incorporate all who receive it into the one true Church of Christ. And this is true of every valid baptism, no matter by whom it may be administered whether by heretic, schismatic, Jew or infidel. "One Lord, one faith, one baptism." Wherefore, every baptized person is a Catholic, a Roman Catholic (the terms are synonymous), until by an overt profession of heresy or act of schism, or by the sentence of major excommunication pronounced against him by the ecclesiastical authority, he is cut off

from the body of the Church. "The Catholic Church..., considering baptism as the *Janua Ecclesiæ*,—'the gate of the Church,' considers every one validly (even though unlawfully) baptized, as a member of the true Church, a Catholic, possessing sound faith, as well as other infused virtues, and as continuing so until some contradictory act destroys the virtue, and transfers the unhappy victim to the dominion of error, schism, or heresy" (Cardinal Wiseman, *Miracles of the New Testament*, Essays, vol. 1, p. 206). But though those who have been baptized can outwardly throw off their allegiance to the Church, abandon her communion, and so lose all right to those spiritual benefits and advantages which the Church bestows so bountifully upon her faithful children, nevertheless they can never free themselves from the bond of subjection and obedience to the authority and jurisdiction of the Church,—a bond that came into being in and through the Sacrament of Baptism, and continues in existence by virtue of the baptismal character which is sealed permanently and indelibly upon the soul. No subject is considered to be released from his obligation of allegiance and submission to lawful authority by the fact that he has committed an act of rebellion, though thereby he has forfeited his rights and privileges. Still less can a creature effectually repudiate and cast off the ties with which the law of God has bound him. Consequently the Church always has and retains her power over all who have been baptized, even though they have attempted to throw off her sweet yoke and have gone out from her. They are therefore subject to her laws, in so far as she wishes and intends them

to be subject; and this is shown too by the constant practice of the Church and by the explicit declarations of the Roman Pontiff. Thus Pope Pius VII in a Brief to the Bishop of Mayence, 8th of Oct. 1803, said: "Quid dicendum erit de illorum sententia, qui jactant hæreticos Ecclesiæ legibus nequaquam subjici, atque inde posse illos novo conjugii fœdere copulari, si primum publicæ auctoritatis judicio solutum fuerit, præpostere inferunt? Adversus illam clamant Scripturæ, Concilia, traditio denique universa. Omnium instar sit Trid. Syn., quæ, *sess. 14, c. 2*, non baptizatos a baptizatis distinguens, illos tantum Ecclesiæ legibus non subjici affirmat, cum Ecclesia in neminem judicium exerceat, qui non prius in ipsam per baptismi januam fuerit ingressus. Hi baptizati ergo Ecclesiæ filii, quamquam rebelles et transfugæ, qui ejusdem Ecclesiæ legibus subjiciuntur; quare suam in illos potestatem exercere nunquam prætermisit Ecclesia, potestate divinitus sibi tradita, quemadmodum infinitis fere historiæ monumentis testatum est."

All heretics and schismatics are bound by the laws of the Church, and in particular by her matrimonial legislation instituting certain canonical impediments invalidating the contract of marriage, unless the Church declares them to be exempt. The Council of Trent knew this, and so, while not willing to make an explicit exception of all heretics, but at the same time desirous to provide some way by which heretics would be freed from the consequences of not observing the law of clandestinity, ordained that the Decree *Tametsi*, instituting the diriment impediment of clandestinity, should not come into operation in any parish till thirty days

after it had been promulgated therein. As the Decree would certainly not be published in places where the heretics were already established, their marriages would thus escape invalidation on the ground of clandestinity. Hence if at the time of the promulgation of the decree in a parish, the heretics were already formed into a separate religious community with its ministers, places of worship, etc., they were not affected by the law. But heretics who lived in a Catholic parish when the law came into force there without any separate religious organization of their own, or who went to reside and establish their separate worship in a parish where the law of clandestinity was already in operation, were bound by the law, and could not validly marry unless they observed the form prescribed by the Council of Trent (Holy Office, 24 Jan. 1852; Gasparri, n. 1184; Wernz, n. 166).

This brings us to the famous Benedictine Declaration, as it is called, which Benedict XIV published, 4 Nov. 1741, for the Federated States of Belgium and Holland (Denzinger, *Enchiridion*, CV, 1324-8) (1). The Decree *Tametsi* had been originally published there under Philip II of Spain; but the country afterwards fell under the Dutch rule, the Catholic religion was proscribed and persecuted, and a situation resulted somewhat similar to that which already existed in England, where Catholic com-

---

(1) That is, not for the present Kingdom of Belgium, where the Decree *Tametsi* has been in full force; but for Holland. An accurate description of the localities comprised in this term is given by Feije, n. 320-322. (Vermeerch, *De Forma*, etc., n. 90, note 4).

munities, parochial and otherwise, had totally disappeared, and had been replaced by heretical organizations. The question therefore arose whether, on account of the previous publication of the Tridentine decree, the marriages of heretics either with one another or with Catholics were valid in this country when the Tridentine form was not observed. Benedict XIV, who before his election to the Supreme Pontificate, had taken part in the discussion of this controversy, and held that these marriages were valid, determined on his elevation to the Papacy to settle the question, and therefore, after discussion in the S. Congregation of the Council, published his declaration that the marriages of heretics without the form prescribed by the Council of Trent were valid in the Federated States of Belgium.

The canonists and theologians who took part in the discussion put forward several reasons for the validity of these marriages; but the one that was really decisive seems to have been this: that the parochial communities for which the decree *Tametsi* had been promulgated, and those which existed after the Protestant rule had been established in these States, were substantially and entirely different. There was no moral continuity such as exists in a parish where the people practise the same religion from year to year and century to century; for then, while the individual members change, the old ones leaving, carried away by death, etc., and new members being added to the community, yet the same society, the same community endures. But in the Belgian States the change had been violent and sudden. The Catholic

communities ceased to exist, and protestant societies or parishes were substituted in their stead. Hence, the promulgation of the Decree *Tametsi*, which had made the law of clandestinity binding upon the Catholic parishes then existing, could not be valid for these communities which did not even exist at the time when the promulgation was made for other communities now defunct. It therefore followed that the marriages of heretics among themselves in these Federated States were and had been, since the extinction of the Catholic parishes, valid; and so it was declared by Benedict XIV (Gasparri, n. 1185-7).

This was the fundamental question decided by the Benedictine Declaration: but a further question immediately arose out of it. What about clandestine mixed marriages? Would they be valid too? Or would they, like the marriages of Catholics among themselves, be subject to the law of clandestinity? In the same decree, Benedict XIV declares the validity of the mixed marriages celebrated clandestinely in the same Federated States of Belgium, for as he narrates in his *De Synodo Diœcesana*, l. 6, c. 6, n. 12, once the validity of the marriages of heretics was granted, the Consultors unanimously (? see Gasparri, n. 1167, note) decided that once they had admitted the validity of purely heretical marriages, they must do the same for mixed marriages.

This was on account of the principle of exemption, according to which, if one of the contracting parties was not bound by the law of clandestinity, he communicated his privilege or quasi-privilege to the other, by reason of the individuality of the

marriage contract. Consequently, as it was declared that the heretics in the Federated States of Belgium were exempted from the Tridentine law of clandestinity, it followed that if one of them contracted marriage with a Catholic, the latter shared the privilege of exemption, and the marriage was therefore valid. This principle of the communication of exemption is certainly not one that can be said to be based on the general principles of law, nor is it one of universal application. This is shown by the fact that it has no place when other unilateral impediments are in question, as the impediment *disparitatis cultus*, or that of age; for if only one of the parties is affected by the impediment in these cases, the marriage is invalid (Gasparri, n. 1167). But it is important to note that Benedict XIV does not represent the principle of the communication of exemption as something new and established by himself; but rather as a principle already known to law, though not admitted unanimously by canonists, and as having been in operation in the past, and consequently validating the mixed marriages that had already taken place in the localities where the exemption of the heretics themselves was admitted. "Concordibus suffragiis in eam sententiam itum est (a canonistis) quod sicuti valida declarata fuerant ea matrimonia quæ in prædictis Fœderati Belgii provinciis inter duos contrahentes hæreticos sine Parochi præsentia inita essent; ita valida dici deberent illa quæ in iisdem locis inter duas partes, alteram Catholicam et alteram hæreticam, eodem modo contracta forent: quoniam, cum conjugum alter, tum ratione loci in quo habitat, tum ratione societatis in qua vivit, exemptio qua ipse

truitur, alteri parti communicata remanet, propter individuitatem contractus, vi cujus exemptio quæ uni ex partibus competit, ad alteram, *secundum etiam civiles leges*, extenditur, eidemque communicatur" (Bened. XIV, *De Syn. Diæc.*, l. 6, c. 6, n. 12· Italics mine).

It remains now that we should ascertain the exact force of the Benedictine Declaration, whether it was a dispensation or a mere declaration; in other words, whether it was a derogation from the law of Trent, granted by the supreme authority of the Sovereign Pontiff, Benedict XIV, or only an authentic interpretation of the law, an affirmation that according to the terms of the Decree *Tametsi* itself, the cases under consideration were not affected by its invalidating clause. There is considerable difference of opinion among canonists on this question. Some, e. g. Ballerini, hold that it is a simple declaration; others (Schulte, Scherer, etc.) consider it to be a dispensation or derogation from the common law; others again, with Father Wernz (n. 167, note 151) and Cardinal Gasparri (n. 1188), maintain that it is principally a declaration, but contains an element of real dispensation, i. e. an act of new legislation. This dispensation, according to those authors, was given, as it were, *ad cautelam*, to make provision for such individual cases as might exist in the Federated States, which were not covered by the general reason upon which the Declaration was based, e. g. if any parishes still existed which retained their original Catholic character and constitution, and where, therefore, the publication of the *Tametsi* was still valid: "Si forte non in quavis parœcia earum regionum ratio declarationis

militaret" (Wernz, *loc. cit.* quoting Consultor). To this Gasparri adds (*loc. cit.*) that the principle of the communication of exemption has the nature of a dispensation.

According to Cardinal Gennari (*Breve Commento*, p. 40), the view that the Benedictine Declaration is a pure and simple declaration, is the more common and the more reasonable; and certainly the arguments which are brought forward to justify it, are very strong. 1° There is the very name of the document, a *Declaration*, and the principal clauses (§§ 2 and 3) are introduced with the words: *declaravit statuitque*, *declarat Sanctitas sua.* Those who hold that it is also a dispensation, point to the word *statuit* as denoting a new act of legislation (Wernz, *loc. cit.*); but this is not necessarily the meaning of the word. In this place, in its conjunction with *declaravit,* it means that the declaration is authoritative and has a binding force which requires that the declaration be accepted by all as a final settlement of the question. This is confirmed by the fact that the words *declaravit* and *statuit* are equally applied both to past and to future marriages: "matrimonia... usque modo contracta, quæque imposterum contrahentur." That there was a dispensation or a *sanatio in radice* validating all these clandestine marriages of the past, is very improbable (1). It is

---

(1) The history of the Confederated Provinces is as follows:—

The rebellion of the Protestants of the Netherlands under William of Orange against the Spanish rule resulted in 1579 in the treaty of Utrecht between the seven northern provinces, by which the Confederation was constituted

therefore only an authoritative declaration that these marriages were valid *ab initio*, because they did not fall under the invalidating law of Trent. "Non fuit ergo abrogata lex exsistens aut nova lex condita, sed solum declaratio authentica tradita legis exsistentis Tridentinæ. Dicitur quidem Pontifex in Const. non solum *declarare*, sed et *statuere*, verum id additum est ad omnem auferendam, si opus est, dubitationem, si quis scilicet censeret ea matrimonia lege Tridentina comprehendi. Cum declaratio sit legis authentica, vim habet quoque, si opus est, statuti. Sed certe cum ad matrimonia etiam præterita extendatur, hæc est *formaliter* declaratio. Quocirca declaratio non *intrinsecam* iis matrimoniis firmitatem

---

under William of Orange as stadtholder, high admiral and commander-in-chief. In 1582 William published an ordinance, which was rigorously enforced, proscribing the Catholic religion; though this was not the beginning of the persecution, for as early as 1566 the Protestants had risen in insurrection, and treated the Catholics, especially priests and religious, with unexampled cruelty. In 1572 the nineteen Martyrs of Gorcum were put to death by the soldiery of Orange. Fighting between the Spanish troops and the United Provinces continued for many years; till by the armistice of 1609, the northern provinces of the Netherlands were recognized as a Republic; but their independence was not definitely acknowledged by Spain until the peace of Westphalia, in 1648. (Alzog, *Church History*, III, p. 382 ff.; Birkhaeuser, *History of theChurch*, p. 605-6).

Therefore, the marriages with which the Benedictine Declaration was concerned, covered a period of something like a century and a half: and so the very great majority of them were already dissolved by death. As will be shown shortly, it is within the power of the Holy See to grant a *sanatio* for marriages already dissolved by

dedit, sed *extrinsecam;* unde est quod de præcedentibus non secus ac de futuris matrimoniis loquitur Pontifex in ea declaratione: idest authentice declaravit *quid jam essent* et quid censendum de illis foret, non autem effecit, ut intrinsece talia, idest valida, essent" (Ballerini-Palmieri, op. cit., n. 1205).

2° Benedict XIV himself in another document says that it was proved that the Tridentine decree did not extend to these marriages: "Ex verissimis... argumentis conjecturisque probatum est Conc. Trid. cum novum illud dirimens impedimentum constituit, decretum suum ad ea matrimonia non extendisse, quæ disceptationi a Nobis an. 1741 solutæ occasionem dedere" (Bened. XIV, Epist. *Singulari Nobis*, 9 Feb. 1747, § 17).

---

the death of the contracting parties (though such *sanatio* is only partial, giving no real validity to the marriages themselves, but being rather a legitimation of the offspring), and the Holy See has at various times exercised this power. Hence the improbability of the *sanatio* in this case does not arise from any *a priori* reason, or from any doubt about the power of the Supreme Pontiff to grant it; but it is based on historical grounds, and reasons of fact, the form of the document, the canonical reason for making the Declaration, Benedict XIV's own intention and his whole mind on the matter, as expressed by himself in his Epist. *Singulari Nobis*, § 17, 9 Feb., 1747, and especially in his *De Synodo Diœcesana*, l. 6, c. 6, where he gives an account of his own view of the question (n. IV), a description of the decree itself, and a summary of the discussion which took place in the Congregation of the Council, held in his own presence. A careful study of this chapter cannot, I think, fail to produce the conviction that the purpose of this decree was to declare that the marriages in question were and had been *ab initio* intrinsecally valid.

3° Pope Pius VII, in refusing to comply with the Emperor Napoleon's request that he should declare the marriage of Jerome Bonaparte with an American Protestant lady null and void on the ground of clandestinity, also gave an authentic interpretation of the Benedictine Declaration: "This principle was established by a decree of Our Predecessor Benedict XIV on the subject of mixed marriages contracted in Holland and in the Federated States of Belgium. *As the decree did not establish a new law, but was only a declaration, as its title shows (that is to say, an explanation of what these marriages really are)*, it is easily understood that the same principle must be applied to marriages contracted between a Catholic and a heretic in a country under the government of heretics; even when the aforesaid decree (*Tametsi*) has been published among the Catholics living there" (1).

As regards a possible dispensation *ad cautelam* contained in the Declaration, for such cases as might require it, it may be that Benedict XIV had it in his mind, but there is no documentary evidence of it. On the contrary, the passage quoted above from

---

(1) "Ce principe a été établi par un décret de Notre Prédécesseur Benoît XIV au sujet de mariages mixtes contractés en Hollande, et dans la Belgique confédérée. Le décret n'établissant pas un nouveau droit, mais étant seulement une déclaration, comme porte son titre (c'est-à-dire un développement de ce que ces mariages sont en réalité), on comprend aisément que le même principe doit être appliqué aux mariages contractés entre un catholique et une hérétique dans un pays sujet à des hérétiques: quand même parmi les catholiques y existant on aurait publié le susdit décret," 27 Junii, 1805.

that Pontiff's letter *Singulari Nobis*, seems to show that he had no misgiving at all on the matter.

Finally with regard to the principle of the communication of exemption, which Card. Gasparri regards as a dispensation (n. 1188), I have already shown from Benedict XIV's own words that the principle was not established by himself, but was already in existence, and was merely applied to the mixed marriages in the question under consideration. Moreover if the principle were a dispensation, and therefore a new act of legislation, it could not have been used, as it was, to show the validity of past mixed marriages, but only to validate clandestine mixed marriages in the future. "Si forte aliquod hujus generis matrimonium (i. e. mixtum), Tridentini forma non servata, ibidem contractum jam sit, aut imposterum (quod Deus avertat) contrahi contingat: declarat Sanctitas sua, matrimonium hujusmodi..., validum habendum esse" (Benedictine Declaration, § 3). This passages shows, too, that it is a mere declaration, and even the *statuit* is wanting in this case.

Intrinsic probability, therefore, seems to lean to the side of those who hold that the Benedictine Declaration is *only* a declaration, and in no sense a dispensation and an act of legislation.

The Benedictine Declaration has, at various times, been extended by the Holy See to many other parts of the world; but it is not necessary here to particularize them further.

But besides the Benedictine Declaration, there are other decrees of the Holy See which grant a real dispensation in the matter of clandestine heretical or mixed marriages or both. These decrees have been given for countries and localities where

the Tridentine law was certainly in force, and binding upon heretics as well as Catholics. Thus a dispensation validating all clandestine mixed marriages was granted for Ireland in 1785; for Hungary and Transylvania in 1841; for Russia in 1780 and Russian Poland in 1844; for Georgia (not the State of Georgia, U. S. A., but Georgia in Asia, lying between the Black and the Caspian Seas) in 1845; for the diocese of Bâle in Switzerland in 1890; and for various parts of what is now the German Empire at different times. In consequence of the validation of these clandestine mixed marriages, it followed, at any rate most probably, that the marriages of heretics with each other also became valid (Wernz, n. 163, note 122; Gasparri, n. 1190).

These dispensations are not extensions of the Benedictine Declaration. They are based on different principles: and the Benedictine decree referred primarily to the marriages of heretics, and to mixed marriages only secondarily and in consequence of the application of the principle of the communication of exemption: but these are real dispensations which have been given directly and exclusively (at any rate as far as the explicit terms of the decrees go) for clandestine mixed marriages. (See Ballerini-Palmieri, n. 1196).

Moreover, the Holy See, as a result of negotiations carried on with the British Government, published the following Decree for the Island of Malta on the 12th of January, 1890: "1, Matrimonia inita vel ineunda ab iis omnibus qui catholicam profitentur religionem, sive quod uterque contrahens sit catholicus, sive quod alter sit catholicus, alter heterodoxus, valida non esse, nisi celebrata fuerint

juxta formam a S. Concilio Tridentino præscriptam in *c. 1 Tametsi, Sess. 24, de Ref. matr.* 2. Eos vero qui diversum a catholico cultum profitentur, valide contrahere posse matrimonium inter se, etiamsi formam Concilii Tridentini non servent, dummodo ceteroquin aliud non obstet canonicum dirimens impedimentum" (Ex. S. Congr. Negotiorum Extraordinariorum, *Acta S. Sedis*, vol. 25, p. 696-7). In other words Pope Leo XIII declared all marriages of heretics among themselves in Malta to be valid even though contracted clandestinely; but that mixed marriages and the marriages of Catholics must continue to be celebrated according to the Tridentine form, so that clandestine mixed and Catholic marriages in Malta remained invalid. It is to be observed that in this Decree the principle of the communication of exemption is explicitly and for the first time disallowed (of course, only for this particular case), and that the provisions of the Decree are practically the same as those of the Decree *Ne Temere*, as regards the subjects of the law. There is absolutely no doubt that up to the date of this Decree given for Malta, heretics contracting marriage in that island were bound by the law of clandestinity. It is therefore equally certain that this act of the Holy See was not a mere declaration but a real dispensation. Nor does the Decree use the word "declaravit," but, "Ssmus. D, N. Leo div. Prov. PP. XIII... pro Apostolico suo munere statuit decernenda, etc."

Finally, Pope Pius X, on the 18th January, 1906, published the Apostolic Bull, *Provida*, by which the Decree *Tametsi*, in other words, the Tridentine law of clandestinity, was extended to the whole of

the German Empire, but both the marriages of heretics and mixed marriages were declared exempt from its operation. "Matrimonia mixta in quibusvis Imperii Germanici provinciis et locis, etiam in iis quæ juxta Romanarum Congregationum decisiones vi irritanti capitis *Tametsi* certo hucusque subjecta fuerunt, non servata forma Tridentina, jam contracta vel (quod Deus avertat) in posterum contrahenda, dummodo nec aliud obstet canonicum impedimentum, nec sententia nullitatis propter impedimentum clandestinitatis ante diem festum Paschæ hujus anni legitime lata fuerit, et mutuus conjugum consensus usque ad dictam diem perseveraverit pro validis omnino haberi volumus, idque expresse declaramus, definimus atque decernimus. 3. Ut autem judicibus ecclesiasticis tuta norma præsto sit, hoc idem iisdemque sub conditionibus et restrictionibus declaramus, statuimus ac decernimus de matrimoniis acatholicorum, sive hæreticorum sive schismaticorum, inter se in iisdem regionibus, non servata forma Tridentina, hucusque contractis vel in posterum contrahendis; ita ut si alter vel uterque acatholicorum conjugum ad fidem catholicam convertatur, vel in foro ecclesiastico controversia incidat de validitate matrimonii duorum acatholicorum cum quæstione validitatis matrimonii ab aliquo catholico contracti vel contrahendi connexa, eadem matrimonia, ceteris paribus, pro omnino validis pariter habenda sint."

In determining the exact force of this Decree, it seems to me that it is necessary to make a distinction. In the German Empire there were, at the date of the Decree, January 1906, 1. localities where the Decree *Tametsi* had never been promulgated; 2. lo-

calities where the *Tametsi* had been published, but where, on account of an extension of the Benedictine Declaration or for some other reason, the marriages of heretics and mixed marriages have been regarded as valid; 3. localities where the Decree *Tametsi* had been published and was in full force, binding both Catholics and heretics.

I. With regard to the first category, the Bull *Provida* applied the Tridentine law of clandestinity to them for the first time. It may, I think, be taken for granted that in all these places the heretics are established in their own separate religious communities or quasi-parishes, and have been so for a long time. Indeed, it is natural to suppose, and is in fact the case in the great majority, at least, of these places, that the heretics far outnumber the Catholics. It is certain, then, that if the Decree *Tametsi* had come into force in these places in the usual manner, that is, by publication in each parish, the heretics would have been exempt from its operation. But it actually came into force by a universal application to all Catholics in those localities, without any special promulgation in each parish, but by virtue of the Bull *Provida*, and simultaneously on Easter Sunday, 1906. The law of clandestinity, therefore, has from the beginning applied only to Catholic marriages, and not to those of heretics or to mixed marriages.

This exemption of heretical and mixed marriages from the operation of the law of clandestinity, an exemption which is explicitly stated in the paragraphs of the Bull quoted above, is, I think, a dispensation in the strict sense of the term; for, in this case, heretics were not exempted *ipso facto*

by the provision of the law of Trent regarding the publication of the *Tametsi*. It was necessary, therefore, that there should be a special and explicit relaxation of the law in their regard, for, as I have already shown, the laws of the Church dealing with matrimonial impediments are *per se* binding upon heretics as well as Catholics. In other words, a dispensation was necessary; for a dispensation is, according to its definition, a relaxation of the law in a special case ("relaxatio legis in casu speciali").

II. The second category comprises those places where the Decree *Tametsi* is in force, but to which the Holy See has extended the Benedictine Declaration, or where for some other reason heretical and mixed marriages have been considered to be valid. In this case the Decree *Provida* is, most probably, not a dispensation but a declaration;—a repetition or continuation of the Benedictine Declaration, and, in those places to which the Benedictine Declaration has not been extended, an authentic declaration of that exemption which is already acknowledged. Of course, if the Benedictine Declaration is really a dispensation, the Bull *Provida* will be, in those places to which the Benedictine Declaration had been extended, a continuation and confirmation of that dispensation.

III. To those localities where the Decree *Tametsi* was in full operation, binding both Catholics and heretics, the Bull *Provida* came as a dispensation for all heretical and mixed marriages to be contracted on and after Easter Sunday, 1906, and as a *senatio in radice* for all similar marriages already contracted and still continuing at that same date.

Here we must note the difference between the

sanatio in radice granted by Pius X for these German marriages, and that claimed for the Benedictine Declaration. The latter decree was a general declaration covering all the heretical and mixed marriages contracted in the Confederated Provinces during a period of at least a century and a half. Of course the great majority of these marriages had been already dissolved by death; and therefore, if there was a *sanatio*, it could be only a partial one, which could give no real validity to the marriages which had already ceased to exist, but would be only a legitimation of the children of the marriages. "Gravissimi Auctores censent sanationem in radice concedi posse, extante prole, etsi uterque conjux defunctus sit; et merito... At in his casibus proprie non est *matrimonii sanatio* (Author's italics), cum matrimonium, non amplius existens in rerum natura, revalidari nequeat, sed est tantum prolis legitimatio concessa per dispensationem legis irritantis *uti ex tunc*" (Gasparri, n. 1446). "Romano Pontifici jure merito etiam vindicatur potestas sanandi matrimonium in radice, etiamsi *unus* vel *uterque* conjux sit *defunctus*, sed proles maneat superstes. At hujusmodi sanatio tantum refertur ad restitutionem quorundam effectuum juridicorum, non ipsius *valoris vinculi matrimonialis*, et potius est singularis quædam forma *legitimationis prolis*" (Wernz, n. 655: Author's italics).

But in the Bull *Provida*. Pius X granted a *sanatio in radice* only for those marriages of heretics and mixed marriages which continued to exist without any revocation of mutual conjugal consent and without any lawful judicial sentence of invalidity until the Easter Sunday of 1906, when the Bull

came into force; so that this *sanatio* was full and complete, conferring actual validity on these marriages from the above date, and all the juridical effects of lawful marriage from the time of their first celebration (Wernz, n. 653); but it has no reference to the marriages that had been already naturally or judicially dissolved.

Still, it must not be forgotten that there is a quite recent example of such a *sanatio in radice* as would be contained in the Benedictine Declaration, if it were more than a simple declaration. Two years after the dispensation above mentioned was granted validating the marriages of heretics in Malta, the Archbishop of that diocese petitioned the Holy See to declare valid the marriages of heretics already contracted in Malta before the date of the decree (12 Jan. 1890). "Cum in prælaudato decreto nulla explicita mentio facta sit matrimoniorum antea contractorum, ad removendum quodcumque dubium, et ad providendum tot matrimoniis absque dicta forma usque in illam diem celebratis, Sanctitatem Vestram enixe rogat Orator, ut etiam illa valida declarare dignetur...

"Resp.—Supplicandum SSmo. ut declaret et decernat matrimonia hæreticorum inter se, non servata Tridentini forma, in Insula Meliten. hactenus contracta, pro validis habenda esse, dummodo aliud non obstiterit impedimentum" (Holy Office, 2 Junii, 1892).—(*Acta S. Sedis*, vol. 25, p. 697-8. See Wernz, n. 654, note 18).

In reply to a question, the Holy Office decided that, as regards the law of clandestinity, the term *heretic* included the following five classes: 1. Those who were baptized as Catholics, but have been

brought up from infancy (i. e. before they came to the use of reason) in heresy, and still profess it; 2. Those who, though not educated in any particular heretical sect, and therefore have not been brought up in any special heretical doctrine or practised an heretical worship, have nevertheless been brought up by heretics, and sometimes attended heretical worship; 3. Those who have fallen into the hands of heretics in their childhood or youth, and have thus become members of an heretical sect; 4. Apostates from the Catholic Church to an heretical sect; 5. Those who, having been born of heretics and baptized by them, have grown up without any particular religion at all, without even any formal profession of heresy. (Holy Office, 6th of Apr., 1859). This is, of course, in addition to those who have been born, baptized and educated in heresy (or schism), and continue to profess it.

Thus far I have described the canonical discipline in force up to the time when the Decree *Ne Temere* comes into operation.

We must now see how this discipline is affected by the new legislation.

§ 1.

Catholic Marriages.

The laws contained in the Decree *Ne Temere*, dealing with betrothal and marriage, are binding upon all who have been baptized in the Catholic Church, and all who have been converted to the Church from heresy or schism; even though they have afterwards fallen away and left the Church.

In other words, the Decree binds all who have been at any time *acknowledged* members of the Catholic Church, and it binds them throughout their lives, so that it is impossible for them to free themselves from the obligations and the disabilities of this decree by apostasy, or lapse of any kind, from the Church. I have said at the beginning of this chapter that all who are baptized are and must be baptized *into* the Catholic Church, by whomsoever they may be baptized. But this is not the same as being baptized *in* the Catholic Church. Heretics and schismatics administer the Sacrament of Baptism, as well as the Catholic Church; and so the phrase "baptized in the Catholic Church" is used in the Decree to distinguish those who are baptized as *Catholics,* as *acknowledged* members of the Catholic Church, from those who are baptized as schismatics or heretics.

The law continues to bind those who lapse from the Catholic Church, whether they formally renounce their faith or not, whether they leave the Church to pass to a schismatical or heretical sect, to Mahometanism or any other form of infidelity, to Agnosticism, Atheism or a state of religious indifference. Such persons cannot validly marry unless they observe the form of marriage prescribed by the Decree *Ne Temere.* The law binds, too, those who, having been baptized as Catholics, have been brought up as Protestants from their infancy (i. e. before they came to the use of reason), so that their lapse from the Church was quite inculpable.

If there was any doubt about this point before, it has now been entirely removed by the recent

decision of the S. Congregation of the Council (1st of February, 1908). The question arose out of a reply to a previous question, viz. whether clandestine mixed marriages in the German Empire would henceforward, by way of exception, be regarded as valid. The answer (which will be considered in the next section) being in the affirmative, it was then asked: "V.—Num in imperio Germaniæ Catholici qui ad sectam hæreticam vel schismaticam transierunt, vel conversi ad fidem catholicam ab ea postea defecerunt, *etiam in juvenili vel infantili ætate*, ad valide cum persona catholica contrahendum adhibere debeant formam in decreto *Ne Temere* statutam, ita scilicet ut contrahere debeant coram parocho et duobus saltem testibus?

"*Resp.*—Affirmative.

"VI.—An attentis peculiaribus circumstantiis in imperio Germaniæ existentibus, opportuna dispensatione providere oporteat?

"*Resp.*—Negative; ideoque servetur decretum *Ne Temere*." It is therefore quite clear that baptized Catholics who have been brought up as non-Catholics from their infancy, must nevertheless be regarded as Catholics, as far as the law against clandestinity is concerned, and are bound by the Decree *Ne Temere*.

As this matter is one of very great importance, I take the liberty of extracting the following long passage from Father Vermeersch's commentary on the Decree *Ne Temere*, as I think it will be found to throw much light on the question, and to be very useful in practice.

I. In primis accurate definitur quinam, in præsenti lege, pro catholicis habendi sint, quatenus regimini catholicorum maneant astricti. Sunt autem:

a) *Omnes in catholica Ecclesia baptizati.* Proprie quidem, nemo baptismate fit hæreticus, nec proin in hæresi baptizatur. Vulgo tamen dicitur in hæresi baptizatus, quicumque ipsis baptismatis adjunctis prospicitur in hæresi instituendus. Age porro, regulam hanc, satis planam, tradit præsens paragraphus discernendi catholicos ab acatholicis, ut primo ad baptismum respiciamus. Præsenti ergo legi subduntur sponsi qui ipso baptismo ad Ecclesiam catholicam pertinere demonstrantur. Tales in primis sunt qui ex parentum vel tutoris voluntate ad ecclesiæ catholicæ fontes deferuntur; tales etiam qui, ex parentibus catholicis oriundi, a laico in necessitate sunt baptizati. Tales, contra, non erunt, quos ministellus hæreticus vel schismaticus ex voluntate parentum (sive hi acatholici fuerint, sive etiam catholici, puta filios principis Rumeniæ (1)) baptizavit. Ac, ni fallimur, simili modo res ista est intelligenda quo, in jure canonico, domicilium originis sumitur pro eo quod dat nativitas in loco, non qualiscumque, sed quæ parentum sede explicatur. Id est, non attendemus qua manu collatus sit baptismus in necessitate vel invitis seu nesciis iis in quorum potestate maneat baptizatus, sed quam directionem baptizatus *in baptismi momento* habere demonstretur.

" Ut paucis exemplis rem illustremus: Catholicus est filius liberi cogitatoris vel socialistæ, qui consentiente parente, a parocho baptizatur catholico, quamvis dein extra omnem religionem instituatur, vel in secta protestante; catholicus etiam ille, cujus parentes, mox post ipsius baptismum, schismatici

---

(1) Bulgariæ?

fiant, vel hæresi nomen dent; vel ille quem parentes catholici, ultro vel coacti, baptizatum tradant instituto protestanti (brephotrophio) instituendum (1). Contra, non est ex *baptismo* saltem catholicus, filius baptizatus ab hæretico, quamvis mox parens alter vel ambo convertantur; nec filius liberi cogitatoris qui, insciis vel invitis parentibus, ab ancilla baptizetur. Fatemur tamen postremum hunc casum magis dubium videri. Sed cum Ecclesia nolit, saltem propter vitanda odia et perversionis periculum, ut pueri, extra periculum mortis, invitis vel nesciis parentibus baptizentur, his auctoritatem tribuit ad definiendam, per electionem baptismi catholici, acatholici vel nullius, formam matrimonialem cui filii erunt obnoxii. Num illicita collatio baptismi, sæpe occulti et ignorati, poterit, nisi catholica dein accesserit professio, auctoritati isti præjudicium afferre? Id ab æquitate canonica putamus esse alienum.

"Quid, si parentes sint ignoti? Ex *institutione* tunc dixerim rem esse definiendam.

"*b*) Catholici præterea sunt omnes ad catholicam Ecclesiam *conversi* ex hæresi vel schismate et jam baptizati. (Catechumeni enim forma baptizatorum non tenentur). Dum baptismus recipitu etiam sine propria voluntate, in infantia, conversio dicit actum personalem. Quare, non ipsa parentum conversione, *conversi* putandi sunt etiam filii, sed oportet ut ipsi, actu satis personali, fidem catholicam sint amplexi. Secundum regulam propositam a Card. Albitio (*De Inconstantia in Fide*, p. 1, c. 14, n. 58, p. 77) et

(1) So also, children baptized as Catholics, who are brought up in work-houses as Protestants, must be reckoned as Catholics.

probatam tacite in litt. S. Officii, 8 Mart. 1882, formalis abjuratio sectæ non est, ante usum sacramentorum, imponenda pueris, nisi sint majores 14 annis, ante quam ætatem non censentur formaliter fuisse hæretici (Cfr. *Coll. Prop. Fidei,* n. 1566: in the first edition, n. 1680). Num formalis conversio seu professio fidei Catholicæ etiam ad eamdem ætatem est differenda, ita ut anterioris conversionis ratio non sit habenda pro matrimonio, ac possint qui nati in hæresi, dein cum parentibus conversi et ad hæresim redeuntes, si nondum 14 annos compleverint, inter acatholicos poni potius quam inter apostatas? Id minime putamus, quia alia causa est eorum qui mere in secta in qua nati sunt perseverant, alia causa eorum qui formalem fecerunt optionem. Profecto, ante ætatem 14 annorum, potest homo religioni assensum formalem dare. Quodnam ergo erit habituale criterium personalis professionis? Ni fallimur, erit regulariter ultronea atque conscia susceptio sacramenti in Ecclesia catholica: confessio, confirmatio, et vel maxime, prima communio. Procul dubio, qui catholice primam fecerint communionem, censebuntur satis professi religionem catholicam, ut numquam immunitate acatholicorum frui possint" (A. Vermeersch, S.J., *De Forma Sponsalium et Matrimonii,* n. 87).

I am, however, unable to follow the learned canonist in all that he says with regard to the children of converts. These must be divided into two categories, those who have come to the use of reason, and those who have not. If they have come to the use of reason, then certainly some personal act is necessary to make them Catholics. But surely this personal act will not be the recept-

ion of the Sacraments of Penance, Confirmation, Holy Eucharist, nor the living of the ordinary life of a Catholic child, for this shows that the child is already a Catholic fully and completely, like any other member of the Church. We must go further back for the act which formally made the child a Catholic; and it is the profession of faith made in his formal reception into the Church. For everyone who embraces the Catholic faith after he has come to the use of reason must be formally received into the Church. If he is converted from infidelity, the ceremony consists in his solemn, unconditional baptism. If from heresy, enquiry must first be made into the validity of the baptism received in heresy. If there is any doubt about its validity, the form of reception is as follows: *a*) the Abjuration or Profession of faith is made; *b*) Conditional Baptism (without the ceremonies—I. *Prov. Council of Westminster, chap. 16, n. 8:* though the ceremonies of baptism may be supplied, if desired by the convert, or if it is thought expedient) is administered; *c*) Sacramental Confession is made and conditional absolution is given. If the baptism proves certainly valid, the Abjuration or Profession of faith is made, followed by the absolution from censures. If the baptism in heresy was certainly invalid, the convert is solemnly baptized, and makes no abjuration or confession. (All this is prescribed in the decree of the Holy Office, 20th of July, 1859 (1). This decree was given as an Instruction for the United States of America, and was extended to England on the 20th of January, 1900. It there-

(1) Collectanea S. Congr. de Prop. Fide, n. 1689,

fore has the force of law in those countries). The only difference as regards baptized children who become Catholics after they have come to the use of reason, is that if they have not yet completed their fourteenth year, they do not make the abjuration, but a simple profession of faith, nor are they absolved from censures. But this profession of faith is undoubtedly to be made, whatever the age of the child may be, given the use of reason. The rule of Cardinal Albizi, referred to in the passage just now quoted from Father Vermeersch is as follows: "First see whether they are sufficiently instructed; and if not, they should be instructed by a competent person. When they are instructed, if they are under fourteen, they are reconciled to the Church by making only the profession of faith; as was observed in 1613, 20th of June, in the case of an heretical English boy, ten years old, and was prescribed to the Nuncio of Cologne, 20th of August, 1614, to be observed.—Prius cognoscitur an sufficienter sint instructi, sin minus mittuntur ad aliquem virum doctum ut instruantur. Demum instructi, si minores sint quatuordecim annorum, sola professione fidei facta, reconciliantur Ecclesiæ: ut fuit observatum de anno 1613 sub die 20 Junii cum puero hæretico anglo annorum decem, et fuit scriptum Nuncio Coloniæ die 20 Augusti 1614 quod ita observaret" (1).

(1) *Op. et loc. cit. supra.* — *Collectanea S. Congr. de Prop. Fide, n. 1680, note.* — The words of this decree of the Holy Office (n. 1680), viz. "secondo le quali (i. e. le regole dell'Albizi) si debba esigere dai giovani aventi l'età di 14 anni la sola professione della fede cattolica; da

This as regards children who become Catholics after they have come to the use of reason.

But is there no remedy before the attainment of the use of reason for children who have been baptized in heresy? Is it not possible to make them Catholics in their infancy, or, when the parents have become Catholics, must the children remain protestants until they can make a personal act of submission to the Church? Undoubtedly, they can be made Catholics at any time. As St. Thomas tells us (*Summa Theol.*, 3 p. q. 68, a. 10) if children have not the use of reason, they are naturally under the care of their parents, as long as they cannot provide for themselves. "Unde etiam de pueris antiquorum dicitur quod salvabantur in fide parentum." If then the parents have given their child a wrong spiritual direction originally by having it baptized in heresy, it is their right and duty, as long as the child remains in the same position of dependence upon them, to repair their error, by making it a Catholic. But how is this to

---

quelli che hanno passato l'età di 14 anni la formula abjura della setta;" and the similar expression of the decree of the same S. Congregation, 20 Nov., 1878: "Quoad abjurationem vero standum est Albitii regulæ, scilicet quod si agatur de adolescentibus qui annum 14 attigerint, sola professio fidei catholicæ ab iis exigenda est antequam admittantur ad sacramenta; si vero agatur de iis qui 14 ætatis annum excesserint, formalis sectæ abjuratio, cui pertinuerint est exigenda" (Bucceroni, *Enchiridion*, p. 248, n. 468), undoubtedly mean that only the profession of faith is to be required of children *up to the age of fourteen inclusively*, and over that age the abjuration must be made. They do not refer in the first part *only* to those who have *already reached* but not completed their 14th year.

be done? The parents' own reception into the Church does not *ipso facto* make their children Catholics, nor is the desire or intention of the parents sufficient to do so. Some external act is necessary to make one a member of the body of the Church.

The first thing to do in practice is, as before, to enquire into the validity of the baptism. If it is found to be invalid, there is no further difficulty. The child is baptized, and is thereby made a Christian, child of God and member of the Church. If the validity of the baptism is not proved with certainty, the child must be rebaptized conditionally. And here the procedure differs from that followed in the case of an adult convert who is baptized conditionally. The latter is usually baptized privately and without the ceremonies. These may be supplied, if it is deemed expedient, but there is no obligation in the matter. The S. Congregation of Rites, asked what ceremonies were to be supplied in the case of an adult convert to be baptized conditionally, replied: "Quatenus supplendæ sint et supplendæ credantur cæremoniæ, ut in dubio, illæ supplendæ sunt quæ pro adultorum Baptismo sunt præscriptæ" (S. Rit. Cong., 27 Aug. 1836; *Decreta Authentica S. Rit. Congr.*, n. 2743, ad 4; *Collectanea de P. F.*, n. 620; see also the "*Suffragium*" written on this decree, *Decreta Authentica S. Rit. C.*, vol. 4, pp. 354-5).

But it is different for children who have not come to the use of reason. The Holy Office (2 Apr. 1879) gave the following decisions at the instance of the Bishop of Nottingham: "An liceat sub conditione baptizare publice, et cum suis cæremoniis parvulos

rationis expertes, qui in protestantismo dubie et sine cæremoniis jam baptizati, sub conditione baptizari debent?

"2. An, si liceat, oporteat etiam sub præcepto hujusmodi parvulis sacras cæremonias adhibere in baptismo conditionato?

"R. ad 1. Baptismum sub conditione, parvulis, de quibus in precibus, in casu administrandum est secreto, et cum cæremoniis in Rituali Romano præscriptis.

"Ad 2. Provisum in 1." (*Collectanea de Prop. Fide*, n. 634).

Therefore there is a strict obligation of baptizing with all the ceremonies a child, not yet arrived at the use of reason, who is to be baptized conditionally. And this conditional baptism certainly makes it a Catholic.

There remains the last alternative. Suppose that no fault can be found with the original baptism, as regards its validity. Can anything then be done? Certainly. The ceremonies of baptism should be supplied. I confess that I know of no decree of the Holy See explicitly ordering this; but I think that it will not be difficult to show that this is the proper thing to do. 1. It is according to the spirit of the Church. "Ritus et cæremoniæ... omitti non debent; et consequenter supplenda sunt in iis, qui vel urgente necessitate, vel apud hæreticos, aut quocumque errore sine ipsis sacro sunt regenerati lavacro. Hinc fuit et est vetus et recens Ecclesiæ mos, qui *praxis* ab Estio nuncupatur, quam variis rationibus confirmat in IV Sent., dist. 6, § 5, easque ibi adducit; quarum prima est, etc." (*Decreta Authentica S. Rit. Congr.*, vol. 4, p. 353). 2. Ar-

guing by parity from the decree of the Holy Office, 2 Apr., 1879, just now quoted, I conclude that the ceremonies should be supplied in this case; for the only circumstance in which the case presented to the Holy Office differs from that of the adult convert, in whose case the supplying of the ceremonies is optional, is this, that the person to be conditionally baptized has not attained the use of reason. This then must be the motive for making the supplying of the ceremonies obligatory: and so, in the present case, when an infant already baptized is to be made a Catholic, the ceremonies of baptism must be supplied; 3. The supplying of the ceremonies of baptism is a rite which is admirably adapted to the purpose, and contains all that is necessary to bring about the desired object, viz. to make the child a Catholic; 4. There seems to be no other rite appointed by the Church for the purpose.

Thus then the children of converts may be made Catholics, whether after or before they have come to the use of reason; and being once Catholics, they remain all their lives subject to the provisions of the Decree *Ne Temere*.

The Decree *Ne Temere*, however, does not bind Catholics of the Oriental Rite. The existing discipline has not been changed in their regard. This has just been decided by the S. Congregation of the Council (1); which was also asked whether a

---

(1) This decision is based on the principle, sanctioned by custom and by the majority of doctors, that Catholics of the Oriental rite are not bound by the disciplinary decrees of the Holy See, unless it is expressly declared

clandestine marriage between a Catholic of the Latin Rite and one of the Oriental Rite would be valid, but has postponed the answer until it has received the report of two Consultors on the subject. The decisions are as follow: "I. An decreto *Ne Temere* adstringantur etiam Catholici ritus Orientalis? —Et quatenus negative: II. Utrum ad eosdem decretum extendere expediat?—Et quatenus saltem

---

that they are included. In an Encyclical Letter of the S. Congregation of Propaganda to the Apostolic Delegates for the Orientals (8 Nov. 1882) the following explanation is given: "You are aware that according to the decretal of Innocent III in the fourth Lateran Council, *Licet græcos*, and according to the explanation given of it in a Congregation of theologians held in 1631 in the presence of Cardinal Pamphili, the majority of doctors, not excluding Lambertini (Benedict XIV) himself, are of opinion that in the Apostolic Constitutions it is not intended to include the Orientals except in the three following cases: 1. In matters of faith and Catholic doctrine; 2. When the subject-matter shows that they are included, it being not merely an ecclesiastical law, but a declaration of the divine and natural law; 3. When, in the case of disciplinary enactments, the Orientals are explicitly mentioned. This teaching of theologians and canonists has not yet been sanctioned by the Holy See. It is certain, however, that the Orientals have, *ab immemorabili*, held the view, both in theory and in practice, that they are not included in the disciplinary Constitutions except in the way described above, and that this conviction of theirs has never been condemned by the Holy See." (Translated from the original Italian: *Collectanea de P. F.*, n. 113).

This letter of Propaganda does not say, as Father Vermeersch, S.J. (*op. cit.*, p. 49, note 2) seems to think, that Lambertini, afterwards Pope Benedict XIV, was present at the discussion over which Cardinal Pamphili, afterwards Pope Innocent X, presided. The discussion took place, as the letter says, in 1631. Prosper Lambertini was born

pro aliquo loco decretum non fuerit extensum: III. Utrum validum sit matrimonium contractum a Catholico ritus latini cum Catholico ritus orientalis, non servata forma ab eodem decreto statuta?—Ad I.—Quoad Catholicos ritus orientalis nihil esse immutatum.—Ad II.—Ad S. Congregationem de Propaganda Fide.—Ad III.—Dilata, et exquiratur votum duorum Consultorum, qui præ oculis habeant

---

in 1675, and became Pope under the title of Benedict XIV, in 1740. But he was one of the doctors who in accordance with the views expressed in that discussion, held that the Orientals were free unless specially included in disciplinary decrees. This is all that Propaganda intends to say.

Benedict XIV's own words on the subject are these (from the *Constitution Allatæ sunt*, 26 July, 1753, § 44: "... Cum in Constitutione (Gregorii XIII an. 1582 quæ agit de Calendario) nullum de orientalibus factum fuerit verbum, exurgit hinc quæstio, num eadem orientales afficiat; quæ quidem quæstio non a doctoribus modo instituitur, ut videre est apud Azorium..., sed etiam proposita discussaque fuit in præstantium virorum conventu habito die 4 Julii anno 1631 in ædibus Cardinalis Pamphylii, qui ad summum Pontificatum evectus, Innocentii X nomen assumpsit. Hæc autem tunc prodiit resolutio: 'Subditi quatuor Patriarcharum orientis non ligantur novis Pontificiis Constitutionibus, nisi in tribus casibus; primo, in materia dogmatum fidei; secundo, si Papa explicite in suis Constitutionibus faciat mentionem, et disponat de prædictis; tertio, si implicite in iisdem Constitutionibus de eis disponat, ut in casibus appellationum ad futurum Concilium. Refertur hæc resolutio tum a Verricello *De Apostolicis Missionibus*, *lib. 3*, *q. 83*, *n. 4*, tum a Nobis in nostro Opere *De Canonizatione Sanct.*, *lib. 2*, *c. 38*, *n. 15*. (*Opera Omnia Benedict XIV*, *tom. 17*, *p. 2* (*Bullarium*) *p. 270: Collectanea de P. F.*, *n. 1999*, where in a note an account is given of the meeting of theologians referred to).

leges hac de re vigentes quoad Orientales." (Die 1 Feb., 1908).

The practical conclusion, therefore, is that the clandestine marriages of Catholics (that is, when both contracting parties are, or have been at one time, acknowledged members of the Catholic Church) are rendered null and void throughout the Western Church by the Decree *Ne Temere:* and also the betrothal of two Catholics becomes invalid, unless the conditions of the Decree *Ne Temere*, art. 1, are observed.

§ 2.

Mixed Marriages.

Moreover, all marriages between a Catholic (in the sense explained in § 1) and a non-Catholic are subject to the law of clandestinity, unless the Holy See has otherwise ordained for a particular locality. We have already seen that the Holy See has granted several dispensations freeing mixed marriages in various countries, Ireland, Hungary, Russia, Georgia, Bâle, and finally the whole German Empire, from the diriment impediment of clandestinity. If therefore the clause of this section of the Decree, "nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum," be interpreted quite objectively, it would follow that in all these countries mixed marriages would be excepted from the law of clandestinity. So also, if the Benedictine Declaration is a real dispensation, all the localities to which it has been applied would be included in the exception: if it is only a declaration of the law

of Trent as affecting those places, they would not fall under the exemption. But it was not the intention of the Holy See to admit all these exceptions; and this has now been authentically declared by the S. Congregation of the Council, which has decided, *facto verbo cum SSmo.*, that the only exception is to be that granted by the Bull *Provida* for the German Empire. "IV. An sub art. XI, § 2, in exceptione enunciata illis verbis 'nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum,' comprehendatur tantummodo Constitutio *Provida* Pii PP. X; an potius comprehendatur quoque Constitutio Benedictina, et cœtera ejusmodi indulta clandestinitatem respicientia?—Ad IV.— Comprehendi tantummodo Constitutio *Provida*; non autem comprehendi alia quæcumque decreta, facto verbo cum SSmo.; et ad mentem" (1 Feb. 1908).

Therefore, 1. all mixed marriages, i. e. marriages between a Catholic and a heretic or schismatic (a baptized non-Catholic), must, under pain of invalidity, be celebrated according to the prescriptions of the Decree *Ne Temere*, except in the German Empire (1). Moreover, the *impedient* impediment *mixtæ religionis* remains in full force in the German Empire as elsewhere. Dispensation from this impediment must therefore be obtained in every

(1) The parish-priest of the Catholic party (by reason either of domicile or a month's residence) is the *parochus proprius* for a mixed marriage. It should therefore be celebrated in his presence, or at least with his permission. Hence, if the bride is the non-Catholic party, the rule that the marriage should be celebrated before the parish-priest of the bride (art. V, § 5) does not hold (Cfr. Boudinhon, *op. cit.*, n. 76).

case, if the marriage is to be licit. Furthermore, the Bull *Provida* does not entirely remove the impediment of clandestinity from mixed marriages in the German Empire; but it changes the *diriment* into an *impedient* impediment: so that even in that Empire clandestine mixed marriages are illicit, though valid.

2. The Bull *Provida* contains no dispensation from the law of clandestinity for the marriages of Catholics with unbaptized non-Catholics in the German Empire. It dispenses only in the cases of *mixed* marriages ("quæ a catholicis cum hæreticis vel schismaticis contrahuntur") and of baptized non-Catholics among themselves ("sive hæreticorum sive schismaticorum inter se"). Wherefore, since the Decree *Ne Temere* prescribes, in this second section of art. XI, that the marriages of Catholics with unbaptized non-Catholics shall be invalid unless celebrated according to the prescribed form of the Church, even though the dispensation from the impediment *disparitatis cultus* has been granted, if the Holy See has not otherwise decreed for a particular locality; and since the Holy See has not made this exception in the Bull *Provida*, and all other possible dispensations have been withdrawn by the decision of the 1st of Feb. 1908; it follows that all such marriages celebrated clandestinely will be everywhere invalid, even in the German Empire.

3. Betrothals between Catholics and non-Catholics, to be valid, must be made in accordance with the prescriptions of the Decree *Ne Temere* (1): and

(1) The Decree says of *Sponsalia* to be contracted between a Catholic and a non-Catholic, that the prescribed

from this law, too, there would seem to be absolutely no exception; for the Holy See has not made one, the Bull *Provida* dealing only with marriage and not mentioning *Sponsalia*.

Consequently, the only exception to the Decree *Ne Temere*, under this section, is that of *mixed* marriages in the German Empire.

§ 3.

Non-Catholic Marriages.

Non-Catholics, whether baptized or not, are in no way bound to contract marriage or *Sponsalia* among themselves according to the prescribed form

---

form must be observed *even after dispensation has been obtained.* For it must not be forgotten that betrothals between a Catholic and a non-Catholic are of their own nature invalid, for they are a promise to do something illicit, viz., to contract a mixed marriage (unless, of course, the condition is added that the promise is to be fulfilled only after the conversion of the non-Catholic party. Gasparri, n. 62). Hence unconditional *Sponsalia* between a Catholic and a non-Catholic are certainly null and void, if contracted before the granting of the dispensation from the impediment *mixtæ religionis* or *disparitatis cultus* (Wernz, n. 94, note 50): and this is so, even though the prescribed solemnities are observed. And even if the betrothal is made dependent on the condition of obtaining the necessary dispensation from the competent ecclesiastical authority, its invalidity still remains probable (Wernz, n. 95; Gasparri, n. 102-4). It follows that Catholics should refrain from contracting, and the Ordinaries and parish-priests from witnessing such *Sponsalia*, before the dispensation has been granted.

of the Church. The reason is not the same in the two cases. The baptized non-Catholic is exempted by dispensation; the unbaptized is not bound, because the Church claims no jurisdiction over him. By a baptized non-Catholic is now to be understood one who was baptized in heresy or schism, was brought up a non-Catholic, and has never been an acknowledged member of the Catholic Church. The Decree *Ne Temere* dispenses such persons only from the diriment impediment of clandestinity. They therefore remain subject to all other matrimonial impediments of ecclesiastical institution.

CHAPTER IX.

The Final Clauses.

"Præsens decretum legitime publicatum et promulgatum habeatur per ejus transmissionem ad locorum Ordinarios: et quæ in eo disposita sunt ubique vim legis habere incipiant a die solemni Paschæ Resurrectionis D. N. J. C. proximi anni 1908.

"Interim vero omnes locorum Ordinarii curent hoc decretum quamprimum in vulgus edi, et in singulis suarum diœcesum parochialibus ecclesiis explicari, ut ab omnibus rite cognoscatur.

"Præsentibus valituris de mandato speciali Ss.mi D. N. Pii PP. X, contrariis quibuslibet etiam peculiari mentione dignis minime obstantibus."

I.—This decree is legally published and promulgated by its transmission to the local Ordinaries. The word 'transmission' must be understood strictly, i. e. as referring to the moment of the actual despatch by the S. Congregation, not to the reception of the copies by the Ordinaries. Even though a copy goes astray in the post, and fails to reach the Ordinary to whom it is addressed, the decree must be regarded as promulgated in his diocese. It suffices that he obtain a knowledge of it through the press (Cardinal Gennari, *op. cit.*, p. 44).

Father Vermeersch, S.J. (*De Forma Sponsalium ac Matrimonii post Decretum "Ne Temere,"* n. 95) discusses a further question, viz., whether the des-

patch of the copies of the decree by the S. Congregation constitutes a distinct and separate promulgation for each diocese, inasmuch as each Ordinary has his own special copy directed to him, or whether the collective despatch of all the copies *en masse* is to be considered as one universal, world-wide, comprehensive promulgation. The practical difference between these two modes of promulgation would be that by the former method it would be absolutely necessary, in order that the decree should be universally promulgated, to forward it to every Ordinary without exception; for if an Ordinary happened to be accidentally omitted, the Decree would not have been promulgated in his diocese. But if the second mode of promulgation be the one adopted, then even though one or more Ordinaries may have been overlooked in the transmission of the document, the decree would nevertheless have been promulgated in the territory subject to their jurisdiction, by the one general act of transmission.

The latter method is most probably the one that has been adopted by the S. Congregation. This appears from the text of the decree, which says that it shall be regarded as promulgated by its transmission to the local Ordinaries—"per ejus transmissionem ad locorum Ordinarios." It does not say: "by its transmission to *each* Ordinary," but indefinitely, "to the Ordinaries," and by one act of transmission—"by its transmission to the local Ordinaries." And then the decree goes on immediately to say that its prescriptions will have the force of law *everywhere*, *ubique*, at a certain date: which evidently supposes that the transmis-

sion to the Ordinaries has already promulgated the law universally—*ubique*.

Besides, the first mode of promulgation would be contrary to the manifest intention of the Holy See, which is to secure uniformity and universality for its law against clandestinity: and therefore to avoid the piecemeal promulgation which the Council of Trent found it necessary to adopt in regard to the Decree *Tametsi* (see the second paragraph of the Preamble of the Decree *Ne Temere*). For promulgation in each parish would be substituted promulgation in each diocese: a promulgation carried out, indeed, in Rome itself, and with the intention of including *every* diocese, and therefore not liable to neglect or omission as was that of the Decree *Tametsi*. But still, it was not impossible that by some oversight a copy of the decree was not sent to some of the Ordinaries; the result of which would be that the decree would not be promulgated in their dioceses: which is manifestly contrary to the intention of the Holy See, and to the words of the decree which declare that it is to have the force of law *ubique* at a fixed date.

Moreover, even supposing that the copy had been sent, it might be lost on its journey, and then the Ordinary would not know whether the decree had been promulgated for his diocese or not.

Furthermore, suppose, as Father Vermeersch says (*loc. cit.*), that there is some part of the world which, the Catholic faith not having yet penetrated there, is not at present under the ecclesiastical jurisdiction of any Ordinary. But in the course of time a Vicariate or Prefecture Apostolic will be erected; and then it would be necessary to send a

copy of the Decree *Ne Temere* to the newly-appointed Ordinary, or else that district would be exempt from the law. This however is plainly in opposition with the explicit terms of the decree, according to which it will be the law everywhere from Easter Sunday, 1908. The view that the act of transmission constitutes one universal promulgation is therefore certainly to be preferred. Finally Cardinal Gennari informs us that the decree has, in fact, been despatched, and consequently that the formal promulgation of the law has been made. "La sola sua trasmissione a tutte le Diocesi (*che già è stata eseguita*), basta per la canonica promulgazione:"—"the mere despatch of the decree to all the Dioceses (*which has already been done*) suffices for the canonical promulgation" (*op. cit.*, p. 15).

"Quocirca, salvo meliore judicio, simpliciorem præferimus sententiam. Intelligimus quidem transmissionem *principiative*, sed transmissioni, qualis *regulariter* fieri consuevit, effectum tribuimus collectivum et universalem. Id est, a die qua, pro more recepto, decretum est ab Urbe ad Ordinarios transmissum, quamvis forte aliquis eorum sit neglectus, promulgatio facta est universalis, sicut poterat esse universalis ab ipsa publicatione quæ fit in Urbe. Hanc autem generalem transmissionem et ephemeridibus et multis indiciis cognoscere possumus, et eam factam in comperto habemus" (Vermeersch, *op. cit.*, n. 95).

II.—The law prescribing the form for the celebration of marriage, as contained in the Decree *Ne Temere*, must be observed *everywhere*. We have seen that Catholics of the Oriental rite are not bound by it; but all other Catholics must obey

it, under pain of the invalidity or the unlawfulness (according to the nature of the infraction) of their marriage, the only exception that has been made being the case of clandestine mixed marriages in the German Empire, which are valid, though illicit. All other Catholics, then, must obey the law, and that wherever they may be. As regards the German Empire, however, it remains still to be decided whether its exception is merely local, or also personal; and also whether an inhabitant of Germany can communicate his exemption to a person of another nationality with whom he wishes to contract a mixed marriage. The two following questions are therefore at present under the consideration of the S. Congregation of the Council: "Exceptio ab hoc decreto pro Germania censeri debet ut mere localis, an etiam personalis, ita ut incolæ illius regionis ubique terrarum exemptione ab hoc decreto gaudeant? Vi decreti *Ne Temere* sublatane est generatim in Matrimonio communicatio exemptionis unius partis alteri parti non exemptæ?"

All particular and local laws and customs that are in any way opposed to the provisions of the Decree *Ne Temere* are revoked and abrogated by it. Everything that would have the effect of limiting the universality of the Decree is abolished. This is shown both by the scope of the law, and by the very clear terms in which it is expressed both in the preamble of the Decree and in these final clauses: e. g. "Its provisions shall begin to have the force of law *everywhere*"—"Let *all* local Ordinaries see that this decree is made public."—"These presents are to have force by the special command of Our Most Holy Lord Pope Pius X,

anything to the contrary, even deserving of special mention, notwithstanding"—" Quae in ea disposita sunt *ubique* vim legis habere incipiant"—" *Omnes* locorum Ordinarii curent hoc decretum quamprimum in vulgus edi "—" Præsentibus valituris de mandato speciali SS.mi D. N. Pii PP. X, *contrariis quibuslibet etiam peculiari mentione dignis minime obstantibus.*"

III.—The Decree *Ne Temere* comes into force on Easter Sunday, April 19th 1908. The ancient discipline ceases at the midnight concluding the day of Saturday, April 18th, and the new law comes into operation at the same midnight that begins the day of Sunday April 19th. On and after that date all clandestine betrothals and marriages of Catholics either among themselves or with non-Catholics (with the one exception already mentioned) will be invalid. But it must be carefully noted that the Decree *Ne Temere* is not retroactive. It will affect no betrothals or marriages contracted before April 19th 1908; but only those entered into from that date. Hence no betrothals will be invalid on the ground of defect of form and solemnity, if they have been contracted before the day on which the law comes into operation. Similarly clandestine marriages contracted before April 19th 1908, in those localities where the Decree *Tametsi* was not binding, will remain valid, as they were from the beginning. Consequently, the confessor or ecclesiastical judge, when dealing with cases of private *Sponsalia* or clandestine marriage after next Easter Sunday, and for a very considerable period after that date, must be careful to ascertain whether the contract of betrothal or

marriage was made before April 19th 1908 or not. If it was made before that date, it must not be judged according to the Decree *Ne Temere*, but according to the canonical discipline which was in force up to April 19th 1908, i. e. at the time when the contract was actually entered into. If, however, the betrothal or marriage took place on or after April 19th 1908, the case must be decided according to the provisions of the Decree *Ne Temere*.

There is one respect in which the Decree *Ne Temere* might perhaps be said to affect marriages contracted before April 19th 1908; though the case is not really an exception. I refer to the revalidation, after April 19th 1908, of marriages invalidly contracted before that date, If the contracting parties are subject to the Decree *Ne Temere*, the renewal of consent must be made according to the form prescribed by that decree; and this is a condition necessary for both the lawfulness and the validity of the contract. But if they are exempted from the operation of the Decree (e. g. in the case of non-Catholic marriages, or German mixed marriages), the observance of the solemnity of form is not necessary for the validity of the marriage. (Cfr. Lehmkuhl, *op. cit.*, II, n. 824: Gasparri, n. 1399, seqq.).

It should be mentioned that some Ordinaries have made application to the Holy See for a postponement for certain localities of the date on which the new law is to come into operation. The following question was therefore submitted to the S. Congregation of the Council: "An et quousque expediat prorogare executionem decreti *Ne Temere* pro nonnullis locis juxta Ordinariorum petitiones?"

The answer given, Feb. 1st, 1908, was: "Ad E.mum Præfectum cum Ss.mo." I understand that the Holy Father has decided that no prorogation is to be granted.

IV.—The Decree directs all local Ordinaries to have its provisions made public as soon as possible, and explained to the people in all the parish-churches of their dioceses. No special method of publication is prescribed. But above all this local publication or the explanations to be given in the parish-churches must not be regarded as a condition the fulfilment of which is necessary for the valid promulgation of the Decree, as parochial publication was necessary for the validity of the promulgation of the Tridentine-Decree *Tametsi*. Ignorance of the law, if it is inculpable, will excuse from formal sin in the non-observance of the prescriptions of the Decree; but it will not give relief from the invalidating effect, if the law is broken in a matter the observance of which is declared by the Decree to be essential to the validity of the marriage.

APPENDIX

I.

Are Private Sponsalia binding in Conscience? [1]

The first article of the Decree *Ne Temere*, *De Sponsalibus et Matrimonio*, enacts that "only those betrothals are considered valid, and have their canonical effects, that have been contracted by means of a written document signed by both parties, and by either the parish-priest or the local Ordinary, or at least by two witnesses." It is quite clear therefore that private *Sponsalia* are by this Decree made null and void canonically and in *foro externo*. But a question arises with regard to the *forum internum*. Does the moral obligation still remain to fulfil the contract of betrothal made privately? Does the mutual promise of future marriage, made without the prescribed formalities, and therefore canonically invalid, still bind the consciences of the betrothed under the grave obligation of contracting marriage with each other?

(1) Cfr. Cardinal GENNARI, *Breve Commento della Nuova Legge sugli Sponsali e sul Matrimonio*, p. 18-20.

The question obviously has a very great practical importance, and is one with which confessors will certainly have to deal soon after the Decree *Ne Temere* comes into force. The heart of the difficulty lies in this: the mutual promise of future marriage, i. e. betrothal, is a natural bilateral contract, and the matter with which this contract is concerned is one which seriously affects the interests and the rights of the contracting parties. It therefore imposes upon them the grave obligation in justice, according to the divine natural law, of fulfilling their promise in due season. But the natural law is immutable. It would seem therefore that the Church has no power to remove the moral obligation which arises from private *Sponsalia* according to the natural law, but that her authority extends only to the canonical effects, and to the validity of *Sponsalia in foro externo.*

The true answer, however, to our question is, I believe, that the new Decree invalidates private *Sponsalia* both *in foro externo* and *in foro interno*, so that when the Decree comes into operation, no obligation in conscience will arise from betrothals entered into without the prescribed formalities.

I propose to take two points for demonstration: 1. that the Pope *can* make private *Sponsalia* invalid *in foro interno;* 2. that by this decree he *has done so.*

I.—The Pope *can* make private *Sponsalia* invalid *in foro interno.*

a) The Pope has jurisdiction over *Sponsalia* as regards both the *forum externum* and the *forum internum;* for he has frequently exercised this jurisdiction. The Holy See has often granted a dispens-

ation from the impedient impediment arising from valid *Sponsalia*, so that the betrothal is dissolved, and both parties to the betrothal may *licitly* choose new life-partners: in other words, the moral obligation arising from the betrothal has been removed. An example of such dispensation may be seen in the *Acta S. Sedis*, vol. 18, p. 506, 12th December, 1885. I need not, I think, prove the original assumption, viz., that the Pope has the power to do this because he has done it; for, "quando agitur de Romano Pontifice personam publicam gerente, a facto ad jus valet illatio" (Gasparri, *De Matrimonio*, n. 158). The Pope alone is the judge of the limits of his own jurisdiction. The Pope therefore has jurisdiction over the moral obligation arising from *Sponsalia in foro conscientiae.*

Gasparri (loc. cit., n. 160) says: "Diximus Romanum Pontificem id [i. e. dispensare ab obligatione sponsalitiae] posse *ex justa causa:* nam Glossa *in can. 1, dist. 22, in Decret.*, v. *injustitiam*, merito docet 'nec Papam debere uni detrahere ut det alteri, nisi subsit causa.' Quaenam causa justa sit pro hac dispensatione, remittitur prudentiae Romani Pontificis; in genere dici potest causam esse justam, si, omnibus perpensis, majora bona ex dispensatione, quam ex adimplemento fidei sponsalitiae praevidentur; sed si sponsalia sint jurata, causa gravior exigitur. Romanus Pontifex hanc dispensationem concedere non solet, nisi ex consulto S. C. C. post monita aut etiam minas inutiles, ut obligatio sponsalitia adimpleatur. 'Nostris... temporibus non omnino infrequentia sunt haec rescripta ob infaustam promulgationem legis sic dictae matrimonii civilis. Aliquando enim evenit, ut quis, spreta fide sponsa-

lium, matrimonium civile cum altera contrahat, et ex ea filios suscipiat, deinde vero petat cum hac matrimonium in facie Ecclesiae celebrare. Obstante parocho assistere huic matrimonio propter impedimentum sponsalium, et sponsa nolente juri suo renuntiare, Summus Pontifex rogatur ut, stante impossibilitate morali contrahendi nuptias cum sponsa, quas lex civilis, etsi per injuriam, legitimas non haberet, ad consulendum tamen bono filiorum et praesertim conscientiae oratorum, Summus Pontifex hanc dispensationem concedit per medium supradictae S. C.' De Angelis, *lib. IV, tit. 1, n. 6.*"

b) A still more direct argument, based on the same assumption as the last, is obtained from the fact that Leo XIII, by a decree to be quoted in the second part of this article, declared private Sponsalia to be invalid *in utroque foro* in South America. That the Pope *can* do this, is therefore manifest.

c) Marriage too is a natural contract, and one which involves a moral obligation that is far graver, and far more binding than that arising from *Sponsalia*. Yet Christ our Lord, who raised the contract of marriage to the dignity of a Sacrament, subjected it to the jurisdiction of His Church. Hence the Church has the power and the right to legislate for Matrimony and to constitute impediments which invalidate the marriage contract. This is of faith: —"Si quis dixerit Ecclesiam non potuisse constituere impedimenta matrimonium dirimentia,... anathema sit." (Conc. Trid., sess, 24, can. 4). We have an example of the exercise of this power in this very Decree, which invalidates the marriages of Catholics all the world over, unless they are

celebrated with a certain external form and solemnity. Therefore *a fortiori*, the Church has the same power over *Sponsalia:* for the canonical rule (*Reg, 58, Juris in 6°*) "cui licet quod est plus, licet utique quod est minus," certainly applies to this case: for betrothal is only the prelude of matrimony, the preliminary act preparatory to the main contract. "Sponsalia sunt quaedam sacramentalia matrimonii, sicut exorcismus baptismi." St. Thomas, in IV Sent., D. 27, q. 2, a. 1, ad 6). Moreover, the jurisdiction of the Church over matrimony extends to the *forum internum* as well as the *forum externum*. For if the Holy See has declared a marriage to have been contracted invalidly on account of some diriment impediment, e. g. that of clandestinity, the contracting parties are not bound to each other by any obligation of conscience, and are free to contract other marriages. So it is therefore with *Sponsalia*.

II.—The Pope by the Decree *Ne Temere*, invalidates private *Sponsalia in foro interno* as well as *in foro externo,* and consequently removes the moral obligation to fulfil the contract.

a) The Decree says: "Ea tantum sponsalia habentur valida et canonicos sortiuntur effectus, quae, etc.:" that is, as Cardinal Gennari (*loc. cit.*) says: "*Sponsalia* contracted without these formalities not only do not produce their canonical effects, but are also null." And they are null both *in foro externo* and *in foro interno*, for the Decree makes no distinction between the two, and expresses no limitation of the invalidity. "Ubi lex non distinguit, nec nos distinguere debemus" (*Ex cap. 6, de major. et obed.*, § 6).

b) This is confirmed by a comparison of the words of the article of the Decree invalidating private *Sponsalia*, with the words of article III, which annuls clandestine marriages:—"Ea tantum sponsalia habentur valida"—"ea tantum matrimonia valida sunt." It is certain that by the latter clause clandestine marriages are invalidated *in foro interno* as well as *in foro externo*. It is impossible therefore to understand the invalidation of private *sponsalia* in any other sense, for the expressions are practically identical, and there is nothing to show that they are to be interpreted differently in the two cases.

c) In my commentary on the article of the Decree treating of *Sponsalia* (1) I mentioned the fact that in Spain *Sponsalia* were not valid in the eyes of the Church unless they were contracted by means of the written instrument of a public notary, and that this condition of validity was extended to the Republics of Central and South America by Leo XIII at the request of the Plenary Council of Latin America, held in 1899. A doubt however arose whether *Sponsalia* not contracted in writing were not valid at least *in foro interno*, which was solved by the decision of the S. Congregation of Extraordinary Ecclesiastical Affairs that such *Sponsalia* were invalid *in foro interno* as well as *in foro externo*. "Ex Audientia Sanctissimi. Die 5 Novembris 1901. Per Decretum Sacrae Congregationis Negotiis Ecclesiasticis Extraordinariis praepositae, datum die 1 Januarii anno 1900, extensa fuit ad Americam Latinam declaratio S. C

(1) pp. 33-34.

Concilii, edita pro Hispania die 31 Januarii 1880 sub hac formula:— Sponsalia quae contrahuntur in regionibus nostris absque publica scriptura, invalida esse, et publicam scripturam supplere non posse informationem matrimonialem... — Circa primam partem hujus declarationis non est una doctorum sententia; plerique enim asserunt invaliditatem ejusmodi sponsalium respicere utrumque forum, tam externum quam internum; nonnulli vero tenent invaliditatem non posse sustineri pro foro interno, dummodo certo constet de deliberato consensu utriusque contrahentis. Suntne invalida praedicta sponsalia absque publica scriptura, etiam in foro interno?

"R. Affirmative, seu esse invalida etiam in foro interno" (*Acta S. Sedis*, vol. 34, p. 398).

This decision is decisive; and there can be no doubt that *Sponsalia* contracted without the formalities prescribed in the Decree *Ne Temere*, will be equally invalid *in foro externo* and *in foro interno*, and will produce no moral obligation to fulfil the the promise of marriage.

d) The Preamble of the Decree has the following passage:—"Bishops... have urged that a remedy be applied to the difficulties that arise from betrothals, that is, mutual promises of future marriage, made privately. For experience has sufficiently shown the danger of such betrothals. They are, first of all, an incentive to sin, and lead to the deception of inexperienced girls, and afterwards give rise to inextricable dissensions and disputes." It is difficult to see how the invalidation of private *Sponsalia in foro externo* only, could achieve the object of the legislation by removing all these dif-

ficulties and dangers: for the net result of such invalidation would be merely to take away the canonical impediments arising from valid *Sponsalia*, to destroy the rights that an injured party would have before an ecclesiastical tribunal, to relieve the offender of all legal consequences of his breach of faith, and to deprive the Church of the means which she has hitherto possessed, of enforcing the fulfilment of the obligation of conscience arising from private *Sponsalia*. This is certainly not a remedy for the evils complained of in the Decree, but rather an aggravation of them.

But if Catholics know (and it will be the duty of the Clergy to instruct them) that a private betrothal is worth absolutely nothing, dissensions and disputes will be easily terminated, and those who are in danger will know the deceiver for what he is. There is no doubt that the object of the Holy See is to discourage and finally to do away with these private betrothals; and the only way to do so is to make them utterly null and void.

An unilateral promise of marriage, made without the prescribed form still remains valid *in foro interno* and binding in conscience, for the Decree deals only with *Sponsalia*, which essentially consist in the *mutual* promise of marriage (1).

Finally, we may not distinguish between *Sponsalia* and the promise in such a way as to say that while the *Sponsalia* as such are invalid, the

---

(1) Cfr. Card. GENNARI, *op. cit.*, p. 20, and ALBERTI, *Commentarium*, p. 8. This question, however, is at present under the consideration of the S. Congregation of the Council.

natural promise with its obligation remains valid: because *Sponsalia* and the *mutual promise* are distinct only as *the thing defined* and its *definition*; and therefore any objective difference between them is absolutely impossible.

But what is to be said about the fundamental difficulty arising from the natural law? We seem now to be on the horns of a dilemma. For if we admit the power of the Pope to invalidate *Sponsalia*, what becomes of the immutability of the natural law? On the other hand, if we maintain the immutability of the natural law, are we not compelled to deny that the Pope can remove the moral obligation to fulfil the contract of future marriage?

This difficulty, however, will disappear, if we are careful to note exactly what it is that the natural law prescribes with regard to *Sponsalia*. A betrothal is a natural contract, and is therefore subject to the natural law of contract. What then is this law? It is that a moral obligation of justice arises from *valid* contracts binding the contracting parties in conscience to their fulfilment. Consequently if a contract is not valid it does not fall under the precept of the natural law, and so there can be no question of a natural obligation to fulfil it. But it has been shown that the Pope has the power to invalidate the contract of *Sponsalia*. Hence when he does so, he withdraws the contract from the sphere of the natural law, which itself is left untouched. The contract, because it is invalid, is not fit matter for the operation of the natural law.

Similarly, with regard to the natural contract of marriage. The natural marriage bond arises from a *valid* contract only. If, therefore, competent auth-

ority invalidates the contract when made without the observance of the prescribed conditions and forms, or makes certain persons incapable of contracting with certain other persons, the marriage bond and its obligations do not arise, for such contracts have been withdrawn from the scope of the law. But the law remains intact. There is therefore no conflict between the Papal power to impose conditions of validity for the contracts of *Sponsalia* and marriage, and the natural law.

A similar difficulty was urged in the Council of Trent against the power of the Church to invalidate clandestine marriages: but it differed from the present objection, inasmuch as it considered matrimony in its aspect as a sacrament, and not as a natural contract. The Church, it was said, cannot make the valid matter and form of a sacrament to be invalid. But by introducing a diriment impediment, the Church would make the valid matter and form of matrimony, to be invalid. Therefore the Church cannot make diriment impediments to matrimony.

The answer given was that the Church cannot make valid matter and form invalid, as long as they remain what they are, without substantial change; as, for example, wine, as long as it remains wine, is valid matter for the Sacrament of the Holy Eucharist, and the Church cannot make it invalid. But if it is substantially changed, e. g. into vinegar, it *ipso facto* ceases to be valid matter for the Sacrament. Now in matrimony, the valid matter and form are comprised in the *valid* contract; and the Church has not the power to make a valid contract the invalid matter and form of matrimony. But she has the power to make what has hitherto

been a valid contract no longer valid as a contract. The contract therefore undergoes substantial change; it becomes an *invalid* contract, and is therefore no longer the valid matter and form of the sacrament of matrimony. Just as any winegrower can make wine into vinegar, and so, by substantial alteration, make what had been valid matter of the Holy Eucharist to become invalid, so can the Church convert a valid into an invalid contract, and so make it invalid as the outward sign of the sacrament of matrimony (cfr. Gasparri, n. 276). Similarly, with regard to the natural contracts of betrothal and marriage, as long as they remain valid, they are governed by the natural law, and their natural bonds and obligations must necessarily be produced; but if competent authority either invalidates or rescinds the contract, it is withdrawn from the domain of the natural law, and all obligation ceases.

"Nevertheless, it does not follow that the deceiver of another in this matter is under no obligation in conscience. He is bound to make reparation for all the injuries he has caused through his invalid promise, and he may not be absolved until he has made this reparation. — Ciò per altro non toglie che in coscienza chi abbia ingannata l'altra parte non sia tenuto a niente. È tenuto a riparare tutti i danni cagionati con la sua promessa nulla, e non lo si può assolvere se non dietro la detta riparazione." (Card. Gennari, *Breve Commento,* 3rd. edit., p. 20).

II.

New Decree of the S. Congregation of the Council

Some difficulties and uncertainties having arisen on certain points connected with the Decree *Ne Temere*, the S. Congregation of the Council has published the following Decree containing the solutions of twelve *Dubia* presented to it for consideration and decision.

ROMANA ET ALIARUM.

DUBIORUM

CIRCA DECRETUM DE SPONSALIBUS ET MATRIMONIO.

Die 1 Februarii 1908.

Vix ac decretum *"Ne Temere" de sponsalibus et matrimonio* ab hac S. C. promulgatum fuerit, pluries ubique excitatæ sunt disputationes de aliquibus illius articulis interpretandis.

Quare sequentia dubia in comitiis subsignata die habitis E.mis Patribus subjecta fuerunt:

I. *An decreto* Ne Temere *adstringantur etiam catholici ritus orientalis.*—Et quatenus negative;

II. *Utrum ad eosdem decretum extendere expediat.* — Et quatenus saltem pro aliquo loco decretum non fuerit extensum;

III. *Utrum validum sit matrimonium contractum a catholico ritus latini cum catholico ritus orientalis, non servata forma ab eodem decreto statuta.*

IV. *An sub art. XI, § 2, in exceptione enunciata illis verbis* " nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum " *comprehendatur tantummodo Constitutio* Provida *Pii PP. X; an potius comprehendantur quoque Constitutio Benedictina et coetera eiusmodi indulta clandestinitatem respicientia.*

V. *Num in imperio Germaniae catholici, qui ad sectam haereticam vel schismaticam transierunt, vel conversi ad fidem catholicam ab ea postea defecerunt, etiam in iuvenili vel infantili aetate, ad valide cum persona catholica contrahendum adhibere debeant formam in decreto* Ne Temere *statutam, ita scilicet ut contrahere debeant coram parocho et duobus saltem testibus.* — Et quatenus affirmative:

VI. *An, attentis peculiaribus circumstantiis in imperio Germaniae existentibus, opportuna dispensatione provideri oporteat.*

VII. *Ubinam et quomodo cappellani castrenses, vel parochi nullum absolute territorium nec cumulative cum alio parocho habentes, at iurisdictionem directe exercentes in personas aut familias, adeo ut has personas sequantur quocumque se conferant, valide matrimoniis suorum subditorum adsistere valeant.*

VIII. *Ubinam et quomodo parochi qui, territorium exclusive proprium non habentes, cumulative territorium cum alio vel aliis parochis retinent, matrimoniis adsistere valeant.*

IX. *Ubinam et quomodo parochus, qui in territorio aliis parochis assignato nonnullas personas vel familias sibi subditas habet, matrimoniis adsistere valeat.*

X. *Num cappellani seu rectores piorum cuiusvis generis locorum, a parochiali iurisdictione exemptorum, adsistere valide possint matrimoniis absque parochi vel Ordinarii delegatione.*

XI. *An a decreto* Ne Temere *abolita sit lex vel consuetudo in nonnullis dioecesibus vigens, vi cuius a Curia episcopali peragenda sunt acta, quibus constet de statu libero contrahentium et dein venia fiat parochis adsistendi matrimoniis.*

XII. *An et quousque expediat prorogare executionem decreti* Ne Temere *pro nonnullis locis juxta Ordinariorum petitiones.*

Quibus vero dubiis E.mi Patres responderunt:

Ad I. Quoad catholicos ritus orientalis nihil esse immutatum. (*Cfr. above, p. 294-7*).

Ad II. Ad S. Congregationem de Propaganda Fide.

Ad III. Dilata et exquiratur votum duorum Consultorum, qui prae oculis habeant leges hac de re vigentes quoad Orientales. (*Cfr. p. 296-7*).

Ad IV. Comprehendi tantummodo Constitutionem *Provida*, non autem comprehendi alia quaecumque decreta, facto verbo cum SSmo; et ad mentem (1). (*Cfr. p. 298-300*).

---

(1) In the third edition of his *Breve Commento*, Cardinal Gennari remarks (p. 46): "Conchiudendosi la risposta al detto dubbio: *et ad mentem*, può essere che la mente riguardi qualche modificazione della Costit. *Provida* da proporre al S. Padre." — "The reply to the *dubium* concluding with the words *et ad mentem*, it may be that the *mens* refers to some modification of the Const. *Provida* to be proposed to the Holy Father."

Ad V. Affirmative. (*Cfr. p. 284-5*).

Ad VI. Negative, ideoque servetur decretum *Ne Temere*. (*Cfr. ibid.*).

Ad VII. Quoad capellanos castrenses aliosque parochos, de quibus in dubio, nihil esse immutatum. (*Cfr. p. 56-7*).

Ad VIII. Affirmative in territorio cumulative habito.

Ad IX. Affirmative, quoad suos subditos tantum, ubique in dicto territorio, facto verbo cum SSmo.

Ad X. Affirmative pro personis sibi creditis, in loco tamen ubi iurisdictionem exercent, dummodo constet ipsis commissam fuisse plenam potestatem parochialem.

Ad XI. Servetur solitum. (*Cfr. p. 189-190*).

Ad XII. Ad E.mum Praefectum cum SSmo. (*Cfr. p. 308-9*).

INDEX

A

Abbot as Ordinary, 63.

Administrator Apostolic as Ordinary, 63.

Apostates, subject to the Church's marriage-laws, 284.

Archbishop (Metropolitan) as Ordinary, 63.

Assistance of Parochus at marriage: *First condition* for validity of: *a*) Parochus must have come into possession of Benefice, or have entered upon Office, 88, 89; *b*) must not be by public decree and by name excommunicated, or suspended from Office, 89-96. *Second condition:* marriage must take place within his territory, 97. Is not an act of jurisdiction, 130-135; must be voluntary, 180, 186 *f;* also see **Delegation;** Exceptions to above law 222 *f.*

Assistant Priest, see **Coadjutor.**

B

Basle, clandestine marriages in diocese of, 276.

Banns, 103, 110.

Belgium, Federated States of, and the Benedictine Declaration, 266 *f.*

Benedictine Declaration regarding marriages of Heretics, 266 *f;* regarding clandestine mixed marriages, 268 *f.* Discussion whether Declaration or Dispensation 270 *f.*

Betrothals, see **Sponsalia.**

Bishop as Ordinary, 63.

Blessing, Nuptial, 26, 104, 110, 112, 113. Not to be confounded with Ritual Blessing, 232; its utility, 232.

Blessing of the Ritual, in case of marriage contracted in absence of Priest, 231-234; Decrees and Instructions relating to, 234-238.

Bonaparte, Jerome, marriage of, 274.

Bride, Parochus of, 195-202; his right to Stole-fees, 262; in case of mixed marriage, when Bride is a Protestant, 298 *n.*

Bridegroom, Parochus of, 195-202; in case of Mixed Marriage, when Bride is a Protestant, 298 *n.*

C

Cardinal, as Ordinary for marriages in titular church, 65; Jurisdictio domestica of, 65.

Catholic, definition of the term, 283 *f.*

Celebrate a marriage, to; the term explained, 120 *n.*

Chaplain, 56, 323-324.

Chapter as Ordinary, 64.

Charles III of Spain, Law of, regarding Sponsalia, 33, 34.

Church, power of, regarding Sponsalia, 311 *f;* and establishment of diriment impediments, 320 *f.*

Clandestinity, 26-31, 97, 98, 113, 151, 178, 224, 246, 247, 276; see also **Benedictine Declaration.** Power of the Church regarding, 114 *f.*

Coadjutor, his claim to the title of Parochus ad mentem Tridentini discussed, 49.

— powers of, as regards marriage, 50-57, 209-216; in the United States, 215-216; in practice not to be presumed full and absolute, 55, 211-215; local custom to be ascertained, 55; in English-speaking countries, 56.

— relation of, to Parochus incapacitated by illness, censure, etc., 57.

— **First** (First Curate) and necessity of Delegation, 209-214.

Conjungere, the force of, in clause *Si quis Parochus* of decree *Tametsi*, 105 *f.*

Contract of Matrimony identical with the Sacrament, 127, 229-230.

Contrahere, force of, in clause *Si quis Parochus* of decree *Tametsi*, 105 *f.*

Converts, 288-294; children of, *ib.*

D

Death, Danger of, sufficient cause for marriage before any priest *ad legitimationem prolis*, 222-226.

Decree, *Ne Temere.* Latin Text, 1; English version, 9; see also under *Ne Temere.*

— of S. C. C. Feb. 1, 1908, 323.

Delegate, conditions for valid assistance of, 219.

— conditions for licit assistance of, 219-221.

Delegation, necessary, 99; conditions for validity of, 69; powers of Parochus regarding, 70; not to be presumed, 71; methods of granting, 72; tacit Deleg-

ation valid, 72; difference between Tacit Delegation and Presumption of Delegation, 73; kinds of express Delegation, 73; *Specialissima*, 74; *Specialis*, 75; *Generalis*, 76; revocation and cessation of, 76, 77.

— Conditions necessary for lawfulness of, 77; as regards Parochus, 77-78; as regards Ordinary, 79; Delegation for Sponsalia, 80-81; to be distinguished from Permission to marry subjects of a Parochus outside his territory, 193.

— Conditions necessary for valid granting of, 204, 205, 219; necessary for coadjutors, save in exceptional cases, 209-211; not necessary for those who supply, 211; coadjutors and Delegation in the United States, 215-216.

— Powers conferred by, 217 *f;* their limit must not be transgressed, 217-218; on the stipulations and conditions contained in articles of, 218, 219.

Discipline of the Church not immutable, 151, 152.

Domicile, 19 *f*, 88, 99, 128, 130, 153; defined, 159, 161, 166, 167; according to the new legislation, 190; necessary only for licit marriage, 191.

E

Engagement of Marriage, 34-36; see **Sponsalia.**

Exceptions to the new Marriage Law, 222 *f;* (i) *In periculo mortis*, 222-226; (ii) when presence of qualified priest is impossible, 226 *f*.

Excommunication (major) *publico decreto et nominatim* invalidates the assistance of Parochus at marriage, 90.

F

Fees, Marriage, see **Stole-Fees.**

G

Georgia (Asia), clandestine marriages in, 276.

German Empire, clandestine marriages in, 277 *f;* relation of, towards the new marriage-laws, 285 *f;* mixed marriages in, according to new Legislation, 298.

H

Heretics, subject to the Church's laws, 263-283; term *Heretic* defined in relation to old matrimonial Legislation, 282-283.

— Dispensed from the marriage-laws by the new Legisation, 283 *f*, 300 *f*.

Holland see **Netherlands.**

Hungary, clandestine marriages in, 276.

I

Impediments, Impedient, 114 *f; Disparitatis Cultus*, 269; *Mixtae Religionis*, 298.

In Facie Ecclesiae, see **Marriage** *in Facie Ecclesiae.*

Interdict, effects of, on Jurisdiction, 94.

Ireland, clandestine marriages in, 276.

J

Jurisdiction, necessary for Ordinary or Parochus assisting at marriage, 61, 89, 93-94, 129; is primarily territorial, 129, 136.

L

Legate, Apostolic, as Ordinary, 66.

Legitimatio, 224.

Legitimus, 157.

M

Malta, clandestine marriages in, 276, 277.

MARRIAGE in absence of Priest, lawful when qualified Priest cannot be had, 226 *f;* manner of contracting, 231-238; Registration of, 251-254.

— **Blessing of,** to be distinguished from the *Assistentia Parochi*, necessary for validity, 94 *n.*

— **Conditions for** validity of, 87; as regards Parochus and Ordinary, 88, 89; for licit celebration of, 190.

— **Exceptions to general laws of,** 222 *f;* (i) *In periculo mortis*, 222-226; (ii) when presence of qualified priest is impossible, 226 *f.*

— **of Heretics,** see **Clandestinity and Heretics.**

— *in facie Ecclesiae*, 115, 126, 128 *f*, 158.

— **Mixed;** clandestine, 268 *f;* under new Legislation, 297; to be celebrated according to regulations of Decree *Ne Temere*, 298-299; exceptions of Bull *Provida*, 299.

— **Place of,** 191; with regard to *Vagi*, 201.

— **Registration of,** see **Registration.**

— **Sacrament of,** identical with the Contract, 127, 229-230; ministers of, are the contracting parties, 59, 60.

— **Surprise** (*Matrimonium ex inopinato*), under Tridentine Discipline valid but illicit, 181-184; a case in Fiction, 185-186; invalid under new Discipline, 186 *f.*

— **Validity of External Form,** 42, 43.

Mayor, 139, 140.

Minister Legitimus, 157, 158.

Minister of Sacrament of Matrimony, the contracting Parties, 59, 60.

N

NE TEMERE, Decree, Latin Text, 1; English version, 9. Identical in substance with Tridentine legislation, 42; differs as regards Promulgation, 43; and in certain modifications, 44; effects of, 97, 98, 153; Promulgation of, to Universal Church, 302-304; not retroactive, 304; Publication of, by Ordinaries, 309.

Nuncio, as Ordinary for marriages, 66.

Netherlands, and Benedictine Declaration, 266 *f;* Confederated Provinces of (1569-1648) 271 *f.*

O

ORDERS, Sacred, not necessary for valid and lawful Assistance at marriage, 42, 93, 129; Suspension from, does not invalidate Assistance at marriage, 91.

Ordinary, significance of term not altered by new Legislation, 44; included in term Parochus, 58; explicitly mentioned in new Decree, 61; Status of, at marriage, 59; those comprised under term, 61-67; relation of, to Parochus, 68; Ordinary and Delegation, 70-79; and Sub-delegation, 77.

— **of Vagi** see **Vagi.**

— Ordinarius Proprius according to Tridentine decree, 99; according to new Discipline, 190.

Orientals, Catholic, exempt from Decree *Ne Temere*, 294-297; further explanatory Decree of S. C. C., 322-324.

P

Paris, Diocese of, Laws regarding quasi-domicile, 19 *f*, 173-4; faculties of First Curates, 56, 209.

Parish-Priest, see **Parochus.**

Parochia Gentilitia, 129.

Parochiality, Rights of, according to new Discipline, 190.

PAROCHUS, 42, 92; significance of, not altered by new Legislation, but more clearly defined, 44; meaning of, according to mind of Trent, 45-49, 57; relation of, towards Coadjutor, see **Coadjutor;** Status of, as regards Sacrament of Matrimony, 59-61, 108, 131; right and duty of, to solemnize marriages, 67, 68; powers of, regarding Delegation, 70, 204; and Sub-delegation, 77; conditions for lawful Delegation on part of, 77-79; as Witness, 81, 84, 86, 131; conditions affecting Parochus for validity of Marriage, 87-89; Assistance of, at Marriage, see **Assistance.**

— **Contrahentium Proprius,** Chaps. II and III *passim.*

— **of Vagi** see **Vagi.**

— **Penalties** incurred by, for violation of new marriage-laws, see **Penalties.**

Parochus of Bride, 201-203; his right to Stole-fees, 262; in case of mixed marriage when Bride is a non-catholic, 298 *n.*

— **of Bridegroom,** 201-203; in case of mixed marriage, 298 *n.*

Pastor, see **Parochus.**

Penalties of Tridentine decree as affected by new Legislation, 258 *f;* suspension *ipso jure* for usurping rights of *Parochus* must be regarded as abolished 260-262.

— contained in decree *Ne Temere,* 255 *f;* are left to discretion of Ordinary, 255; all *ferendae sententiae,* except forfeiture of Stole-fees, 256, 258.

Pope, as Ordinary, 61, 62 *n;* power of, regarding Sponsalia, 311 *f.*

Prefect Apostolic, as Ordinary, 63.

Promulgation of Decree *Ne Temere,* 302 *f.*

Proposal of Marriage, 36, 37; see **Sponsalia.**

Provida, Bull of 18 Jan. 1906, 31, 277-282, 298-299, 323-324.

— Decree of S. C. C., regarding, 322 *f.*

Q

Quasi-domicile, 19 *f,* 30, 88, 99, 128, 130, 153, 160; origin and history of, 161 *f;* opinions of canonists regarding, 162 *f;* Sanchez, 162-164; Tusco, 166; Reiffenstuel, *ib.;* Benedict XIV, 167-168; Holy Office (1867), 169 *f;* law of, derogated from by Holy See, 172-174.

— not recognized by decree *Ne Temere,* 191.

R

Register, Baptismal, see **Registration.**

Register for Marriages, must be kept by Parochus *sub gravi*, 239-240; must be a *book*, 240.

Registration of Marriages, to be made in special Register, 239-240; is grave duty of Parochus, 241; but not of Delegate, *ib.;* prescribed formulas to be used in, 242 *f;* details to be recorded, 242-243; must also be made in Baptismal Register, 245 *f;* under grave obligation, 246; Parochus of marriage must officially notify Parochus of place of Baptism when necessary, 245, 254.

Residence, see **Domicile** and **Quasi-domicile.**

Revalidation of Marriages contracted under old legislation (previous to April 19, 1908), 308.

Russia, clandestine marriages in, 276.

S

Sanatio in Radice, 280-282.

Schismatics, subject to the Church and her laws, 263 *f.*

Solemnity, 26-27.

Solemnizing of Marriages, the right and duty of Parochus, 67-68.

Sotto-curato, see **Coadjutor.**

Sponsalia, defined, 32; canonical effects of, 33; external form of, *ib.:* in Spain, *ib.;* in South America, 34; Private or Clandestine, 34, 38, 39; on Sponsalia contracted in English manner, 34-38.

— **Private**, as affected by decree *Ne Temere*, 39, 40; are they binding in conscience? 311 *f.*

— **Solemn**, 33, 39; ought to be encouraged, 40.

— Delegation for, 80, 81,

— between Catholic and non-Catholic, 299-300 *n.*

Status Liber of contracting Parties, 200; law regarding, unchanged by decree *Ne Temere*, with one exception, 189, 190; Explanatory Decree of S. C. C., 324-325.

Stole-fees, 197-203; forfeiture of, in violation of marriage-laws, 255; not forfeited by Parochus marrying subjects of another in case of necessity without permission, 257.

Subdelegation, 71, 74, 77.

Subjects of Marriage-law, under the Tridentine legislation, 263-283; under the new legislation, 283 *f.*

Suspension, kinds of, 91, 95; effects of, on validity of Assistance at marriage, 91-93; suspension *ab officio* invalidates, 91; but not suspension *a beneficio*, or *ab ordine*, *ib.*: effects of suspension *a jurisdictione* discussed, 91-96; suspension *ipso jure* of Tridentine discipline for usurping rights of Parochus at marriage abolished by decree *Ne Temere*, 260-262.

Synods, decrees of recent, and law of quasi-domicile, 174.

T

Tametsi (decree of Council of Trent on marriage), 27-31, 97, 98; origin of, 266; compared with decree *Ne Temere*, 42, 43; inquiry into interpretation of, 99 *f.*

Telegraph, use of, forbidden in granting of faculties, 225-226.

Testis Qualificatus seu Auctorizabilis, 95, 128, 136, 138; see **Witness.**

Transmission of Decree *Ne Temere*, 302-305.

Transylvania, clandestine marriages in, 276.

V

Vagi, 99, 161, 190-192; Parochus of, according to old Discipline 197 *f;* according to new Discipline, 198-199, 220; Ordinary of, 201, 220.

Vicar Apostolic, as Ordinary, 63-64.

Vicar Capitular, as Ordinary, 64.

Vicar-General, as Ordinary, 63; jurisdiction of, 95 *n.*

Vicarius,
Vicaire,
Vice-Curatus,
Vice-Parochus,
see **Coadjutor.**

Vice-Parochus, necessity of Delegation for, depends on Diocesan law, 209-214; and Registration of marriages, 241; faculties of, in diocese of Paris, 56, 209.

W

William of Orange, 271 *n.*

Witness, signification of term not altered by new Legislation, 44.

Witnesses, persons eligible as, 81-82; must be present at marriage *humano modo*, 83; simultaneously, *ib.;* as witnesses *formaliter qua tales*, 84, 85; presence of, not of necessity to be voluntary, 187; compulsion of, unlawful, 188.

— Presence of *two*, necessary for validity, in case of marriage contracted in absence of Priest, 228 *n.*

Workhouses, 287 *n.*

CORRIGENDA

	Errata	Corrige
p. 7, l. 13	– libri	librum
p. 16, ll. 12, 13	– who assisted at	of
p. 23, l. 17	– after *testibus*, add: "as the Council of Trent ordains."	
p. 29, l. 1 of note	– underatand	understand
p. 171, l. 2	– for first word read	sensu
p. 197, l. 24	– imarrage	marriage
p. 239, l. 3	– X	IX
p. 280, l. 3 from end	– *senatio*	*sanatio*
p. 287, l. 7 „ „	– recipitu	recipitur

Page 153. — To prevent possible misunderstandings, the author desires to emphasize the fact that the phrase: — It is true that doctors were in error as to the interpretation of the Tridentine Decree: — is merely hypothetical, i. e. dependent on the hypothesis: — if the view taken by Mgr. Sili, Père Pie de Langogne and other eminent canonists be correct (see p. 151): and the phrase is used here only with the object of showing that, even in such a supposition, neither the authority of the Church not that of the *Schola Theologorum* is imperilled or injured in the slightest degree, and of anticipating possible objections on these points.